Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SCOTT BERGMAN,
Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*
Respondents.

Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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June 11, 2010

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QUESTIONS PRESENTED

1. After *Citizens United v. F.E.C.*, 558 U.S. ___, 130 S.Ct. 876 (2010), may the government selectively prohibit face-to-face communication based on the speaker's viewpoint, by permitting defense lawyers to solicit settlements from accident victims, while prohibiting plaintiffs' lawyers from soliciting them to litigate?

2. Does the viewpoint-conscious speech rule in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) survive *Citizens United*?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the District of Columbia, the defendants in this proceeding are the Mayor of the District of Columbia in his official capacity; Adrian Fenty and the Council of the District of Columbia and its members each in his or her official capacity: Linda W. Cropp, Kwame R. Brown, Sharon Ambrose, Marion Barry, David A. Catania, Vincent C. Gray, Jack Evans, Jim Graham, Phil Mendelson, Vincent B. Orange, Sr., Kathleen Patterson and Carol Schwartz.

No relief is sought from these parties other than that sought against the District of Columbia.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that the Court issue a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The unpublished decision of the Superior Court for the District of Columbia is set forth at pages 42a to 64a of the appendix (App. 42a - 64a). The published decision of the District of Columbia Court of Appeals, App. 1a-41a, is reported at 986 A.2d 1208 (D.C. 2010).

JURISDICTION

The District of Columbia Court of Appeals issued its decision on January 14, 2010.

On March 25, 2010, Chief Justice Roberts granted petitioner's application for an extension of time until June 11, 2010. Case 09A893.

This Court has jurisdiction to review the final judgment of the District of Columbia Court of Appeals under 28 U.S.C. § 1257(b).

STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Council of the District of Columbia enacted "The White Collar Insurance Fraud Amendment Act of 2006," D.C. Law 16-144 (Act 16-340), 53 D.C. Reg. 2838 (effective July 25, 2006) (hereinafter, "the Act"). The section of the Act at issue here is codified in the D.C. Code's Title 22, "Criminal Offenses" at D.C. Code §22-3225.14:

> § 22-3225.14. Prohibition of solicitation.
>
> (a)(1) Except as provided in paragraph (2) of this subsection, it is unlawful for a practitioner, whether directly or through a paid intermediary, to solicit for financial gain a client, patient, or customer within 21 days of a motor vehicle accident with the intent to seek benefits under a

contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident.

(2) The prohibition in paragraph (1) of this subsection does not prohibit:

(A) A practitioner from soliciting a client, patient, or customer by regular mail through the U.S. Postal Service or through the use of general advertising directed to the public;

(B) A practitioner or his agents from contacting a potential client, patient, or customer, or a family member, friend, or coworker of the potential client, patient, or customer, where the practitioner has a preexisting business or personal relationship with the potential client, patient, or customer;

(C) A practitioner or his agents from contacting a potential client, patient, or customer where the contact was initiated by the potential client, patient, or customer, or by a family member, friend, or coworker of the potential client, patient or customer; or

(D) Providing advice and assistance to incarcerated persons in pursuing administrative remedies that may be a prerequisite to suit or in seeking appropriate medical care and treatment.

(b) Except as provided in subsection (a)(2) of this section, it is unlawful for a person to solicit for financial gain a client, patient, or customer within 21 days of a motor vehicle accident for the

purpose of directing the client, patient, or customer to a practitioner.

(c) A person or practitioner found by clear and convincing evidence to have violated the provisions of this section shall be subject to a civil penalty of $1,000. The Mayor may increase this penalty by rulemaking.

(d)(1) If a person involved in an automobile accident, or his parent or guardian, executes, within 21 days of a motor vehicle accident, a release of liability, without the assistance or guidance of legal counsel, pursuant to the settlement of a claim for personal injury, that person or his parent or guardian may void the release; provided, that the insurance carrier or other settling party receives written notice of the intent to void the release within 14 days of the date that the release was executed, and the written notice is accompanied by any check or settlement proceeds related to the claim for personal injury that had been delivered to the claimant.

(2) A release of liability executed within 21 days of the accident giving rise to the claim of personal injury by a person who is not represented by counsel shall contain a notice of the claimant's right to rescind conspicuously and separately stated on the release.

(e) The provisions of this section are not severable.

STATEMENT OF THE CASE

A. Facts

1. Representation of indigents

Plaintiff Scott Bergman is a licensed attorney in the District of Columbia. He specializes in representing victims of motor vehicle accidents in tort litigation. App. 65a-66a.

Bergman's clients are among the District's poorest residents. App. 66a. Many have no lawyers, and no legal representation, prior to their contact with Bergman. *Id.* Many speak little English. *Id.* Many of Mr. Bergman's clients have expressed fear of the court system, and many have confused insurance adjusters with government officials. App. 66a

2. The Act's legislative record

When the Council of the District of Columbia enacted the Act in 2006, it relied on newspaper articles and testimony from insurance defense counsel complaining that plaintiffs' lawyers and their agents often intruded on the privacy of accident victims with direct solicitations to litigate their claims. App. 4a-8a, 70a-72a. This testimony condemned plaintiffs' lawyers as "an unsavory group" who have "cast a dark shadow on the legal profession." App. 72a.

The testimony was not confined to protection of victims' privacy. The District's legislative record included the testimony of the President-Elect of the D.C. Bar Association, who promoted the Act as a salutary measure to reduce "unnecessary" tort claims by poor victims. App. 72a (testimony of Keith W. Watters: "One insurance company noted a marked

decline in the number of injury claims during the period the 6th District stopped allowing runners access to accident reports.") The District relied on Mr. Watters' testimony that tort claims resulting from direct lawyer contact are often "unnecessary," and "lead to rate increases for the parties involved." App. 72a.

3. Effects of the Act

After the passage of the Act, insurance companies and their representatives have aggressively sought to make contact with unrepresented victims of motor vehicle accidents. App. 68a. The Act permits agents for tortfeasors and their insurers to initiate contact in person within the 21-day period. Section 22-3225.14(d)(1) allows releases so obtained to become irrevocable after only 14 days. As a result, a release signed within seven days of an accident will become irrevocable under the Act prior to the end of the 21-day period in which plaintiffs' lawyers are barred from face-to-face contact.

Since the passage of the Act, many accident victims have been persuaded to sign binding releases of their claims for little or no compensation. App. 67a.

B. Proceedings Below

On October 31, 2006, plaintiff Scott Bergman filed a Complaint seeking declaratory and injunctive relief from enforcement of the White Collar Insurance Fraud Amendment Act of 2006, D.C. Code, § 22-3225.14. He alleged that the Act imposed a discriminatory right to communicate conditioned on the speaker's identity and viewpoint, in violation of his federal rights under the First Amendment. He also alleged that the Act violated the D.C. Home Rule Act,

D.C. Code §§ 1-201.01 *et seq.* (2007 Supp.) This claim is not at issue in this petition.

On May 23, 2008, the Superior Court (Hon. Judith Bartnoff) issued an opinion and order denying Plaintiff relief, and granting the Defendants' motions for summary judgment. App. 42a-64a. On January 14, 2010, the D.C. Court of Appeals affirmed. App. 1a-41a.

The Court of Appeals held that the District of Columbia could permissibly single out plaintiffs' lawyers for its moratorium on in-person contact, while permitting insurers to solicit releases in person during the same period. The Court of Appeals relied on *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). App. 14a-23a.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision approves a selective prohibition on communication based on the speakers' identity and viewpoint, in conflict with *Citizens United v. Federal Election Comm'n*, 558 U.S. __, 130 S.Ct. 876 (2010). It raises a Constitutional problem affecting most states, to which state legislatures and courts have framed different answers. This decision raises an important question of federal law that this Court should resolve.

1. The unexamined problem of viewpoint discrimination in *Went for It*

In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), this Court approved a 30-day moratorium on attorney contact with accident victims. The Court reasoned that the victims' right to privacy justified the moratorium. We have no quarrel with this central holding of *Went For It*.

The question presented here is whether the Government must enforce this restriction even-handedly. The District of Columbia permits defense lawyers and insurers to solicit releases from accident victims in person during the very time that plaintiffs' lawyers are forbidden from such contact. While a moratorium may be justified to insulate accident victims from all uninvited contact, it is unconstitutional when it suppresses one point of view in favor of another.

In the wake of *Went For It*, most states have enacted restrictions similar to Florida's. However, there has been a sharp divergence among state laws as to whether the moratorium must be equally applied to defense agents as well as plaintiffs' lawyers. For example, in *Alexander v. Cahill*, 598 F.3d 79, 96-103 (2d Cir. 2010), the Second Circuit upheld a New York moratorium on victim contact that is scrupulously even-handed. New York forbids both plaintiffs' lawyers and "representative[s] of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants" from uninvited contact within 30 days. 598 F.3d at 85, *citing* N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.36(a).

However, the laws of other states canvassed in *Alexander*, 598 F.3d at 97 n.14, vary widely between prohibitions on contact "concerning an action for personal injury" (which would include an insurer's solicitation for a release) to only a "solicitation of professional employment from a potential client . . ." *Compare*, *e.g.*, Conn. Rules of Prof'l Conduct R. 7.3(a)(3) *with* Tenn. Rules of Prof'l Conduct R. 7.3(b)(3), *cited* in *Alexander*, 598 F.3d at 97 n.14. The District of Columbia's law, unlike New York's, permits insurers the very contact that is denied to

plaintiffs' lawyers. The District even provides that releases obtained through such contact may become irrevocable before plaintiffs' lawyers are allowed the same in-person contact. *See* D.C. Code §22-3225.14(d)(1).

New York's even-handed approach is correct, not merely as a matter of enlightened legislative policy, but as a matter of Constitutional principle. The Court of Appeals' contrary decision illustrates all of the harms of viewpoint discrimination corrected in *Citizens United v. Federal Election Comm'n*, 558 U.S. __, 130 S.Ct. 876 (2010).

The Court of Appeals first relied on anecdotal evidence of abusive contact similar to that presented in *Went For It*. App.15a-16a. This misses the point. The District of Columbia may certainly regulate abusive solicitation, either by prohibiting all uninvited contact or by forbidding specific abuses like calls outside working hours. But these valid concerns do not give the District the power to pick and choose among speakers:

> Speech restrictions based on the identity of the speaker are all too often simply a means to control content. Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to

> determine for itself what speech and speakers are worthy of consideration.

Citizens United, 130 S.Ct. at 899.

The Court of Appeals dismissed the viewpoint-discrimination problem. It held that the D.C. Council could properly decide that "restrictions of in-person solicitation by practitioners were needed more urgently, and should be more severe, than restrictions on insurers and their agents." App. 19a. The Court of Appeals approved the D.C. Council's view that insurers are better behaved as a class than plaintiffs' lawyers:

> It is difficult to imagine such a victim receiving unwelcome visitors, or intrusive telephone solicitation, from a large number of insurance representatives, in the early hours of the morning or late at night (or at all times in between) in the immediate aftermath of an automobile accident. The record of solicitation of accident victims by multiple practitioners, *see* Part I, *supra*, therefore provides persuasive justification for this difference in legislative treatment.

App. 19a.

This is explicit viewpoint discrimination. The Court of Appeals held that strangers proposing litigation are more prone to obnoxious conduct than strangers soliciting victims for releases[1], and so that Government may use the proponent's message as the

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[1] The Court of Appeals implied that insurers seeking releases would not be strangers to the victim. App. 5a. This is simply wrong. By definition, a party interested in soliciting an accident victim's release of a claim will be the tortfeasor or its insurer—as much a stranger to the victim as any other.

litmus test for whether contact is prohibited. If legislatures may circumvent the First Amendment this easily, then *Citizens United* means nothing. The same disparaging legislative findings could be made about abortion opponents, corporate campaign donors, labor unions or anti-war protestors. The legislature is free to address the secondary harms of speech conduct, but it may not do so by picking out the speaker's message as the criterion. "When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy." *Citizens United*, 130 S.Ct. at 911.

The Court of Appeals' decision is all the more disturbing, because the District's legislative record identified the suppression of tort claims in poor neighborhoods as a valuable effect of the Act. App. 72a. The District of Columbia thereby stated an interest, not in protecting accident victims from annoyance, but in preventing them from filing tort claims. *Id.* This is unconstitutional. "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought." *Citizens United*, 130 S.Ct. at 908.

The Court of Appeals also cited the *Went For It* majority's acknowledgment that the Florida moratorium may occur "at a time when other actors—opposing counsel and insurance adjusters—may be clamoring for the victim's attention." 515 U.S. at 633. The Court of Appeals concluded that this passage amounts to approval of differential speech regulation between plaintiffs' lawyers and insurers. App. 23a. If that is the way the lower courts read

Went For It, this Court should correct that impression after *Citizens United*.

Justice Kennedy's four-justice dissent in *Went For It* focused on this very issue:

> Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family . . . offering competent legal assistance. Meanwhile represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. *Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement.* This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.

515 U.S. at 636 (Kennedy, J. dissenting) (emphasis added).

Justice Kennedy's dissent in *Went For It* makes essentially the same point against viewpoint discrimination as his dissents in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 713 (1990) and *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 287 (2003). In *Citizens United*, the Court adopted Justice Kennedy's dissents in *Austin* and *McConnell* to hold that the First Amendment bar against selective speech control outweighs *stare decisis*.

The Court should make its revival of the First Amendment in *Citizens United* consistent by adopting Justice Kennedy's dissent in *Went For It* as well.

2. Commercial speech is subject to the same viewpoint discrimination rule.

The Court of Appeals held that the government had greater leeway to approve the differential access allowed insurers and plaintiffs' lawyers because they are engaged in commercial speech. App. 14a-16a. The Court of Appeals invoked the familiar multi-factor test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-65 (1980), on which the Court relied in *Went For It*.

The difficulty for lower courts is that, while the *Central Hudson* factors continue to be cited *in haec verba*, their meaning has changed over the past thirty years.

When *Went For It* was decided in 1995, commercial speech law broadly permitted government to suppress messages it disfavored. *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) (it was "up to the legislature" to reduce gambling by suppressing in-state casino advertising.) Because *Posadas de P.R.* was still the law in 1995, the issue of discriminatory treatment between insurers and plaintiffs' lawyers was not troubling to the *Went For It* majority.

Since *Went For It*, however, the Court has overruled *Posadas de P.R.*, to hold that the government may not prohibit truthful commercial speech just because the government disfavors its message. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510-512 (1996). Even where the ban is less than total, and where the disfavored speaker has less effective alternative forms of communication, viewpoint discrimination as between two commercial speakers is unconstitutional. *See Greater New Orleans*

Broadcasting Assn. v. United States, 527 U.S. 173, 193 (1999) (government could not prohibit broadcast advertising of non-Indian casinos while permitting it to Indian casinos.)

However, lower courts applying the cryptic *Central Hudson* factors must still search for cases that most clearly fit the fact pattern at issue. In this case, *Went For It* presents itself as the controlling case. If cases like *44 Liquormart* and *Greater New Orleans Broadcasting* have modified *Went For It*, it is necessary for this Court to say so clearly here.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX A

District of Columbia Court of Appeals

No. 08-CV-859

SCOTT N. BERGMAN,
Appellant,

v.

DISTRICT OF COLUMBIA, *et al.*,
Appellees.

Argued Oct. 1, 2009
Decided Jan. 14, 2010

Before BLACKBURNE-RIGSBY and OBERLY, Associate Judges, and SCHWELB, *Senior Judge*.

SCHWELB, *Senior Judge*:

Scott N. Bergman, a member of the District of Columbia Bar, brought this action against the District of Columbia and the Members of the Council of the District of Columbia,[1] challenging the validity of the White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2006 ("the Act"), D.C. Law 16-144 (Act 16-340), 53 D.C.Reg. 2828 (effective July 25, 2006), codified at D.C.Code § 22-3225.14 (2009 Supp). Bergman asserted that the Act unconstitutionally restricts his freedom of speech and constitutes impermissible "viewpoint discrimination." Bergman also alleged that in enacting this

[1] The basis upon which relief was sought against individual Council Members is unclear. In light of our disposition of this appeal, however, we do not address this issue.

statute, the Council violated the District of Columbia Home Rule Act ("HRA"), D.C.Code §§ 1-201.01 et seq. (2007 Supp.) and the "separation of powers" doctrine by "usurp[ing] the judiciary's power to regulate the conduct of D.C. attorneys."

The trial judge rejected these contentions and granted the motions of the District and the Council Members for summary judgment. On appeal, Bergman contends that the trial judge erred in her ruling with respect to each of his claims. We affirm.

I.

THE TRIAL COURT RECORD

A. *Legislative Background*

The Act makes it unlawful for "practitioner[s]" to solicit business from "a client, patient, or customer within 21 days of a motor vehicle accident with the intent to seek benefits under a contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident." D.C.Code § 22-3225.14(a)(1).[2] A "practitioner" is defined as "a person, licensed to practice a profession or trade in the District, whose services are compensated either in whole or in part, directly or indirectly, by insurance proceeds." D.C. Code § 22-3225.01(9). The Act thus applies not only to lawyers, but to "all relevant practitioners (*e.g.*, attorneys, health care professionals, and others licensed to practice a profession or trade in the District)." D.C. COUNCIL, REPORT ON BILL 16-208 at 1 (Feb. 7, 2006).

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[2] The Act prohibits in-person and telephone solicitations, and in this opinion, we shall refer to these prohibited activities collectively, for convenience, as "in-person solicitation."

The Act contains several exemptions from this twenty-one day prohibition. It permits immediate solicitation of legal business from accident victims through the mail, and the proscription against in-person solicitation does not apply if there is a preexisting relationship between the practitioner and the person solicited, or if the contact is initiated by the "potential client, patient, or customer." D.C.Code § 22-3225.14(a)(2). The Act also provides that any release of liability executed within twenty-one days of an accident "without the assistance or guidance of legal counsel" is voidable within 14 days of the execution of such a release. D.C.Code § 22-3225.14(d)(1). It further requires that any such release "shall contain a notice of the claimant's right to rescind conspicuously and separately stated on the release." *Id.* § (d)(2).

The Act was intended to address "an existing problem with practitioners (or their agents) soliciting accident victims." D.C. COUNCIL, COMMITTEE ON THE JUDICIARY, REPORT ON BILL No. 16-208 (hereinafter "REPORT") at 1 (Nov. 8, 2005). The Act also prohibits the Metropolitan Police Department (MPD) from releasing "reports of motor vehicle accidents" within twenty-one days of an accident to persons who are barred by § 22-3225.14 from soliciting clients, unless the individual requesting the report presents identification and certifies that he or she is eligible to obtain the report pursuant to the Act. D.C.Code § 5-113.06(c). However, practitioners are authorized to receive accident reports immediately if they represent, under oath, that they will not use them to solicit in-person legal business within twenty-one days after an automobile accident. Council-member Phil Mendelson, the Chairman of the Judiciary Committee, explained that the bill "is a

consumer protection measure which serves to protect accident victims from being victimized a second time by harassing phone calls and other personal contact looking for business out of the accident." REPORT, at 1. The Act was passed unanimously by the Council.

While considering the proposed legislation, the Council received extensive information regarding the practices sought to be prohibited and the effects of these practices upon victims of accidents and their families. The legislative record included, *inter alia*, sworn statements of persons who had been subjected to unwanted and intrusive solicitation at all hours of the day and night, testimony from representatives of several Bar groups, and articles in the press describing the specific practices of practitioners who engaged in this type of solicitation and also the practices of the practitioners' agents, known as "runners."[3] A detailed description of the kinds of problems that the Act was designed to address is contained in the July 12, 2005 testimony of Kenneth M. Trombly, a past president of the Trial Lawyers Association of Metropolitan Washington, D.C., before the Judiciary Committee, and we quote from that testimony at length:

> Mr. Chairman, if you had the misfortune to be involved in a motor vehicle accident in the District of Columbia, you would very likely encounter the following scenario. There is a good chance that a person known as a runner would come to the accident scene. He or she might interfere with the ambulance personnel or other

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[3] *See* Holly Bailey, *Crash Chorus*, WASHINGTON CITY PAPER, February 2003, at 11; Libby Copeland, *Streets Strewn With Glass, Gold; "Runners" Make a Living Off D.C. Car Wrecks*, WASHINGTON POST, May 1, 2003, at A1.

person there to help you. Before you leave the scene, the tow-truck operator might try to steer you to a certain law firm that pays him for referrals. At the emergency room you might likely be solicited by someone who is receiving a kickback from a lawyer. And then when you got home, hoping for a little peace and quiet, perhaps having a sleepless night due to the anxiety and the physical discomfort you are experiencing, you would be awakened early the next morning by persons calling you at home—because in the world of the runner, a man's home is not his castle.

They will have picked up the police report the night before or that very morning and will be on the phone, trying to convince you to let them come to your house with a retainer agreement so that you can hire a lawyer for whom they work. Even if you are not injured, or do not wish to make a claim, they would likely try to talk you into making a claim. "It's easy money," they would say. "Just go to this chiropractor—Just let me come by and I will have some papers for you to sign." By the end of the day you might have received dozens of such phone calls.

The runners pay signing bonuses to clients, they get kick-backs from some health care providers to steer people to their offices, they make promises of easy money and they encourage frivolous claims. There are also a small number of lawyers, who apparently make these calls themselves, and eliminate the middle man. Of course, intrusive, uninvited solicitation is no less

> offensive because a lawyer, rather than a runner, is making the call or the home or hospital visit.[4]

According to the May 1, 2003 article in The Washington Post, see note 3, *supra*, one attorney stated that each year, he paid at least $100,000 to "runners."

Several accident victims, all of whom had suffered injuries ranging from sore backs and necks to headaches and, in one case, a fractured wrist, reported their experiences with solicitation practices of the kind described by Mr. Trombly. One of the victims was awakened by a telephone call at 6:00 a.m. on the day after the accident from a "seemingly desperate individual who wanted me to talk to his attorney," and he received multiple similar calls throughout the morning until he stopped answering the telephone. A second affiant promptly contacted his own attorney, and that attorney sent an investigator out

> to have me sign papers. In the meantime, someone else presented at my house and told me he was an investigator for an attorney. I signed

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[4] In its November 8, 2005 REPORT TO THE COUNCIL, *supra*, at 1-2, the Judiciary Committee described the problem as follows:

> Practitioners hire intermediaries to solicit accident victims in hopes of filing claims; these intermediaries are commonly known as "runners." Runners often engage in aggressive tactics to obtain accident victims' personal information and then to solicit their business. For example, runners regularly line up at police stations to obtain copies of police accident reports which detail the name and personal information for those involved in the incident. The runners then proceed to cold-call or visit the victims in hopes of convincing individuals to file claims. Typically the runners are paid by practitioners for each successful referral. This practice was vigorously protested at the public hearing by a wide range of witnesses.

> the papers with him but he was not the investigator from my attorney but rather one for another attorney, whom I had never contacted.

Another victim reported calls from "5 or 6 attorneys who were trying to get my business[,]" and she stated that the calls all came between 9:00 p.m. on the evening of the accident and 6:30 a.m. on the following day. An attorney who was injured in an automobile accident wrote that she was released from the hospital at 1:00 a.m. with pain medication because her head and neck hurt "pretty badly." She stated that she received multiple telephone solicitations shortly thereafter, the first being from an "investigator" who called at 7:00 a.m., with a dozen more calls and voice mail messages before noon.[5] Bergman himself acknowledged in an affidavit that he made approximately 4,000 solicitations per year—*i.e.*, an average of approximately eleven per day, seven days a week—and as the appellees point out, he was just one lawyer. Keith W. Watters, Esquire, who testified on behalf of the Bar Association of the District of Columbia on July 12, 2005, stated that "[r]unners and the lawyers who employ them have cast a shadow on the legal profession and the legitimate claims of injured parties." He added:

> Once the accident report was viewed, the accident victim[s] and their family can expect an unrelenting barrage of telephone call[s] and in person solicitations starting at 5:00 a.m. in the morning. One victim reported 17 calls in one day. Runners

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[5] The injured attorney told some of the lawyers who solicited her business that she was a member of the Bar herself. She asked them for their Bar numbers "just to gauge their reaction." She reported that "there was some stammering, stuttering, and a quick farewell."

> are outlawed in 49 states. We would strongly recommend that the District immediately ban this distasteful and corrupt practice.

Taken as a whole, the legislative record supports a finding that even if no overly aggressive tactics were employed—a dubious assumption—the sheer number and frequency of the telephone calls and in-person contacts to which many accident victims were subjected in the immediate aftermath of an accident could be extremely disturbing and unsettling.[6]

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[6] Obviously, not all members of the Bar supported the proposed Act, and after its passage, opponents complained bitterly regarding its operation. In an affidavit filed in the instant action, plaintiff Scott W. Bergman stated, *inter alia*:

> Since the enactment of DC Law 16-0144, this law has caused serious harm to my legal practice and my effectiveness to represent auto accident victims in the District of Columbia. I have been unable to obtain any DC PD-10 police reports in order for my firm to make the allowable arm's length contact by phone and/or mail to victims of these unfortunate auto accidents that occur within the District. I am also subject to unnecessary prosecution by having to prove that every client that I represent post enactment of [§] 16-0144 falls within the guidelines of the new law in order to avoid prosecution and loss of my license to practice law. Further, several employees of my firm have [been] treated harshly and unconscionabl [y] by employees of the Washington DC Metropolitan Police Department at various District station houses and they have all [been] denied access to view and/or copy DC PD-10 auto accident police reports since the enactment of DC Law 16-0144.

Bergman claimed that many of the persons whose business he solicited were poor, had limited education, and were unaware of their rights. He argued that in the absence of in-person solicitation, such persons have no realistic access to counsel even if they have meritorious claims. Another attorney, Robert L. Berkebile, Esquire, stated in an

B. *The Trial Judge's Ruling*

On May 23, 2008, the trial judge granted summary judgment in favor of the defendants in a thoughtful and well-crafted order in which she rejected both of Bergman's challenges to the Act. The judge began by addressing the First Amendment issue. She described the conduct at which the Act was aimed as "commercial speech," and she held that it was therefore subject to "intermediate scrutiny." She concluded that the Act passed muster under this standard because it was narrowly drawn and because it directly and materially advanced a substantial government interest, namely, the protection of the privacy of citizens and consumers in the District of Columbia [7]

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affidavit that as a result of the passage of the Act, he had to "scale back [his] practice and would have to release employees because of the lack of automobile cases coming into [his] practice."

[7] The judge also relied on the presumption of constitutionality, as articulated in *Hornstein v. Barry*, 560 A.2d 530, 533 (D.C.1989) (en banc). It is not at all clear that this presumption applies to legislation regulating commercial speech. *Compare State v. Casino Mktg. Group*, 491 N.W.2d 882, 885 (Minn.1992) ("a strong presumption in favor of the constitutionality of a statute governing commercial speech would run an unacceptable risk of chilling protected speech") *with H.J. Wilson Co. v. State Tax Comm'n*, 737 So.2d 981, 1009 (Miss.1998) (dissenting opinion) (adopting unpublished opinion of Chancery Court) (court should be "mindful . . . of the presumption of constitutionality" in cases involving commercial rather than political speech); see *generally Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 477, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1977). Because we conclude that even absent a presumption of constitutionality, the Act does not violate the First Amendment, we take no position with respect to whether or to what extent that presumption applies in this case.

The trial judge was unpersuaded by Bergman's claim that the Act constituted "viewpoint discrimination." In support of that contention, Bergman relied primarily on *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The judge pointed out, however, that in *R.A.V.*, *id.* at 388-89, the Supreme Court "recognized that state regulation of client solicitation by attorneys for remuneration is not viewpoint discrimination." The judge concluded that "[t]he restriction at issue here is not aimed at the content of speech, but at its secondary effects." She further explained:

> The Supreme Court in *R.A.V.* also noted that no issue of content discrimination is raised where there is no realistic possibility that official suppression of ideas is afoot. 505 U.S. at 390. There plainly is no such realistic possibility here, given that the restriction is only for 21 days and that contacts by mail are permitted even during that period.

The judge noted that in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), decided three years after *R.A.V.*, the Supreme Court upheld a substantially broader restriction of solicitation by attorneys than that imposed by the Act.

The trial judge also rejected Bergman's contention that the Act contravenes the HRA. She correctly described the issue presented as being whether this court's authority to regulate the practice of law is exclusive "so as to preclude the Council from exercising its police power to address matters that otherwise would clearly be within its legislative purview, if the legislation also restricts the professional conduct of attorneys." The judge disagreed with Bergman's

claim, based on *Banks v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 634 A.2d 433 (D.C.1993) (*Banks II*), and *In re Banks*, 805 A.2d 990 (D.C.2002) (*Banks III*), that this court's authority to regulate the practice of law is "exclusive." She observed (accurately) that the language in these decisions relied on by Bergman was dictum, and that it was based on an inaccurate citation of an earlier precedent.[8]

The judge concluded that the Act does not violate the HRA because it "does not directly affect the organization or jurisdiction of the District of Columbia courts, nor does it interfere with the Court of Appeals' authority over Bar admission or attorney discipline." She described the Act's temporary restriction on in-person solicitation as "a narrowly drawn anti-fraud criminal and consumer protection statute intended to protect against harassment of motor vehicle accident victims and the invasion of their privacy, in the immediate aftermath of an accident," and she held that the Act "does not unduly burden the Court of Appeals in the exercise of its core functions." This timely appeal followed.

II.

THE FIRST AMENDMENT CLAIM

A. *Commercial Speech*

Bergman's claim that the Act denies him the freedom of speech guaranteed by the First Amendment raises a constitutional issue of considerable moment, for it implicates "the core values of a free society." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 595 (D.C.2000). "The guarantee of free

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[8] The opinions in *Banks II* and *Banks III* are discussed in detail in Part II C, *infra*.

speech . . . forms the constitutional and philosophical bedrock of our Republic." *Id.* Indeed, "the free flow of ideas and opinions is integral to our democratic form of government." *Id.* (quoting *Ollman v. Evans*, 242 U.S.App. D.C. 301, 305, 750 F.2d 970, 974 (1984) (en banc) (plurality opinion), *cert denied*, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985)). "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert A. Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Guilford*, 760 A.2d at 596 (quoting *Gertz*). The Council is therefore barred from prohibiting the advocacy of an idea or the communication of an opinion because it disagrees with the speaker's message. "More than two centuries ago, the French philosopher, Voltaire, anticipatorily articulated the spirit of our First Amendment when he [reportedly] wrote to Helvetius that 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Guilford*, 760 A.2d at 595-96.

This case, however, is not about the benign democratic ideal of opposing views competing for public acceptance. Rather, it is about practitioners aggressively seeking to secure potentially profitable business. As the Supreme Court stated in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 459 (1978), "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation."[9] Regulation of

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[9] "[T]he solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential

commercial speech is reviewed under the "intermediate scrutiny" standard, which is less rigorous than the "strict scrutiny" that is applied to restrictions on non-commercial speech. *Id.* at 456-57; *see also Went For It*, 515 U.S. at 623.

Although Bergman depicts the issue in this case as involving a battle of ideas—fighting for the accident victim's rights against surrender of the victim's claim by settlement without the benefit of legal advice—the critical and dispositive fact is that we are dealing here with uninvited attempts to secure employment for remuneration—a classic example of a business transaction. *See Ohralik*, 436 U.S. at 459.[10] Never-

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for harm to the prospective client." *Ohralik*, 436 U.S. at 454. It is also worth reiterating, in this connection, that "[t]he rules are based in part on deeply ingrained feelings of tradition, honor and service. Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." *Id.* at 460 (citation omitted).

[10] We agree with the following statement in the brief for the Council Members:

> Mr. Bergman has conflated a communication whose primary purpose is to secure the accident victim as a paying client with the inextricably linked provision of legal advice, which presumably would convey a viewpoint contrary to that which might be provided by an insurance agency or its agents or a defense lawyer. The conceptual problem with this argument is that Mr. Bergman or any other attorney who wishes to convey unsolicited legal advice to an accident victim within twenty-one days of an accident may do so in person as long as the attorney is not securing that victim as a client for remuneration. The Supreme Court in *Ohralik* made that exact point: "The Rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice." *Ohralik*, 436 U.S. at 458. In other words, no expressive speech is being restricted and no viewpoint suppressed.

theless, since the First Amendment is marginally implicated, *id.*, the regulation (i.) must address a "substantial interest"; (ii.) must "directly and materially advance that interest"; and (iii.) must be "narrowly drawn." *Went For It*, 515 U.S. at 624 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-65, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)). In our view, the Act satisfies all of these criteria.

(1) *The District's substantial interest.*

We are satisfied that the Act addresses a substantial governmental interest, namely, the protection of consumers from unsolicited and often distressing one-on-one intrusions upon their privacy, effected for the purpose of securing their business in the immediate aftermath of an automobile accident, a time when many of them are likely to be in physical or emotional distress or in vulnerable circumstances.

In *Went For It*, which we consider dispositive of the First Amendment issue in this case, the Supreme Court held that a Florida Bar rule prohibiting "personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster" did not violate the First Amendment (as applied to the State of Florida by the Fourteenth). 515 U.S. at 620. The Court so held even though solicitation by direct mail is far less intrusive [11] than the kinds of solicitation by uninvited personal visits or unwanted telephone

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[11] In his testimony before the Council advocating enactment of the proposed legislation, see pp. 4-5, *supra*, the representative of the Trial Lawyers Association noted that in *Went For It*, the Supreme Court upheld a prohibition against solicitation by "the *far less intrusive mechanism of direct mail*." (Emphasis added.)

contacts at issue in the present appeal. The Court concluded in *Went For It* that Florida had "a substantial state interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers." *Id.* at 624. The Court stated that "[o]ur precedents also leave no room for doubt that the protection of potential clients' privacy is a substantial state interest,") *id.* at 625 (quoting *Edenfield v. Fane*, 507 U.S. 761, 769, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)) (internal quotation marks omitted). Moreover, "the State bears a special responsibility for maintaining standards among members of the licensed professions." *Ohralik*, 436 U.S. at 460.

(2) *The advancement of the District's interest*

We have no doubt that the Act, even more than the Florida regulation at issue in *Went For It*,[12] substantially advances the legitimate state interest in protecting the privacy and tranquility of accident victims and their families. In *Went For It*, the Supreme Court upheld Florida's thirty-day prohibition on direct-mail solicitation of accident victims—a far more extensive restriction than that imposed by the Act. The Court relied on various kinds of evidence, including anecdotal reports, newspaper articles, and complaints from potential clients who had received unwanted solicitations. *Id.* at 626-27. In this case, as

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[12] An accident victim can simply throw an unwanted mail solicitation into the waste paper basket (or, preferably, into a recycling receptacle). Moreover, the mail arrives in the daytime, usually only once a day. It is more difficult to dispose of or deal with an uninvited personal solicitation or of a series of unwanted and aggressive telephone calls, often late at night or in the early morning hours, especially in the immediate aftermath of an upsetting accident.

in *Went For It*, the record includes articles in the media, as well as testimony from representatives of the Bar Association of the District of Columbia, the Trial Lawyers Association, and the United States Attorney's Office, regarding the mischief caused by uninvited in-person solicitation. It also contains reports from individuals describing the intrusion upon their privacy which resulted from the practices sought to be prohibited. Moreover, the Court stated in *Went For It* that "we have permitted litigants to justify [commercial] speech restrictions by reference to studies and anecdotes pertaining to different locales altogether[.]" *Id.* at 628. Accordingly, Florida's experience and that of other jurisdictions may also be considered in assessing the constitutionality of the District's legislation. We are therefore satisfied that the legislative record regarding the effects of in-person solicitation conducted a short time after a motor vehicle accident readily satisfies the "substantial interest" prong of the *Central Hudson* standard.

(3) *The scope of the Act*

Following its earlier decision in *Central Hudson*, the Supreme Court recognized in *Went For It* that a regulation limiting commercial speech must be "narrowly drawn" to focus upon the substantial interest sought to be served. 515 U.S. at 624. The Court explained, however, that the phrase "narrowly drawn" does not require the legislature to select the "least restrictive means" available. Indeed, the Court stated, "the least restrictive means test has no role in the commercial speech context." *Id.* at 632 (citation and internal quotation marks omitted). Rather, it is sufficient if the restriction is "in proportion to the

interest served."[13] *Id.* We believe that the Act satisfies the requirement of proportionality.

The statute challenged here does not *prohibit* personal solicitation, or even *immediate* personal solicitation. On the contrary, like the more extensive regulation upheld in *Went For It*, it imposes only a brief time restriction regarding when and how such solicitation may be carried out. It applies only to the in-person solicitation of business from a limited, and identifiable group of citizens, namely, accident victims and their families. The Act targets and proscribes the precise source of the kinds of problems described in the legislative record-intrusive personal solicitation by practitioners, or their agents or runners, in the immediate aftermath of an accident. The Act can therefore fairly be described as "narrowly drawn," and it deals only with the specific harm sought to be addressed.

In *Went For It*, the Court explicitly held that the "brief 30-day period" prohibiting direct-mail solicitation of accident victims is "reasonably well tailored to its stated objective." *Id.* at 633. The Court's reasoning applies a *fortiori* to this case, for the Act prohibits only in-person solicitation (but not direct-mail contact),[14] and the prohibition is for only twenty-one days, a briefer period than was at issue in *Went For It*.

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[13] We have stated in a different context that "[p]roportionality is of consummate importance in judicious adjudication." *Allen v. United States*, 603 A.2d 1219, 1227 (D.C.1992) (en banc).

[14] The dissenting justices in *Went For It*, who would have struck down the Florida regulation, also recognized the difference between solicitation by mail, which they viewed as constitutionally protected, and "direct, in-person solicitation," which, as the Court had held in *Ohralik*, is not to be accorded First Amendment protection. *Went For It*, 515 U.S. at 637-38.

The Act thus constitutes a reasonable means to achieve the legitimate objectives of the Council.[15]

B. *Speech and Verbal Conduct*

Bergman contends, however, that the Act is aimed at the content of an attorney's speech (*i.e.*, his or her encouragement of potential clients not to settle their cases immediately without legal counsel) and that it discriminates on the basis of the speaker's viewpoint. We do not agree.

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of a disagreement with the message it conveys." *Hill v. Colorado*, 530 U.S. 703, 719, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). The "threshold consideration" is the purpose of the restriction. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). In the present case, the stated (and obvious) purpose of the Act was to prevent the intrusive solicitation and

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[15] Several United States Courts of Appeals have upheld the constitutionality of laws similar to the Act as against First Amendment challenges, relying in each case on the authority of *Central Hudson, Ohralik*, and *Went For It*. See, *e.g.*, *Capobianco v. Summers*, 377 F.3d 559, 562, 564-65 (6th Cir.2004) (affirming trial court's rejection of First Amendment challenge to Tennessee regulation barring chiropractors from soliciting the business of accident victims within thirty days of an accident; the court so held notwithstanding plaintiffs' claim that regulation denied them equal protection because it did not apply to medical doctors); *Falanga v. State Bar of Georgia*, 150 F.3d 1333, 1344-45 (11th Cir.1998) (upholding, as consistent with First Amendment, a rule prohibiting attorneys or their agents from in-person, uninvited solicitation of unsophisticated, injured, or distressed lay persons).

harassment, often by numerous practitioners or their runners or agents, of individuals who had very recently been involved in automobile accidents, and who were likely to be in vulnerable circumstances. The Act was not aimed at chilling the exercise by accident victims of their right to seek legal redress, and it does not inhibit such exercise.

The Council could reasonably conclude that restrictions of in-person solicitation by practitioners were needed more urgently, and should be more severe, than restrictions on insurers and their agents. This is so because, in the absence of legislative protection, the victim of an accident might well be subjected to unwelcome and intrusive contacts from a dozen or more personal injury attorneys, or from persons working on these attorneys' behalf. In most or all instances, on the other hand, only the insurers of the persons involved in the accident—ordinarily two at the most—would have any reason to initiate uninvited contact with the victim. It is difficult to imagine such a victim receiving unwelcome visitors, or intrusive telephone solicitation, from a large number of insurance representatives, in the early hours of the morning or late at night (or at all times in between) in the immediate aftermath of an automobile accident. The record of solicitation of accident victims by multiple practitioners, see Part I, *supra*, therefore provides persuasive justification for this difference in legislative treatment. The Council was not obliged to accord to practices which constitute a major intrusion on victims' privacy treatment identical to that provided to practices that create a less serious problem. *Cf. Capobianco*, 377 F.3d at 564-65 (regulation of solicitation by chiropractors but not by medical doctors sustained against equal protection challenge,

where there was no evidence that medical doctors engaged in solicitation).

The District may, without violating the First Amendment, regulate *conduct* that accompanies speech, without regard to the *content* of the speech. *R.A.V.*, 505 U.S. at 385. Speech may not be proscribed because of the ideas it expresses, but it may be restricted because of the manner in which it is communicated or the action that it entails. *Id.* The Court recognized in *R.A.V.*, for example, that the legislature has "the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise)." *Id.* To be sure, speech may not be denied full First Amendment protection because its "content communicates any particular idea." *Id.* at 393. Speech may be restricted, however, when it "embodies a particular intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.* (emphasis in original).

The Act was not aimed at the "content" of a practitioner's speech, but at the offensive behavior that often accompanies its delivery. Legislation aimed at intrusive and exploitive practices cannot reasonably be viewed as siding with insurance companies, or as seeking to inhibit the exercise by accident victims of their right to counsel. The Act does not "disapprove" any message. As the trial judge concluded, "[t]he restriction in the Act is not directed at the legal advice the plaintiff might be seeking to provide to a potential client in the immediate aftermath of a motor vehicle accident, but rather to the nature of the solicitation itself of the client for remuneration."

C. *Viewpoint Discrimination*

Bergman contends that the Act does not subject insurance agents, adjusters, and attorneys for prospective defendants to the same restrictions as it imposes on practitioners, and that under the Act, the limitation of speech depends on whether the speaker advocates early and uncounseled settlement (which, according to Bergman, is accorded favorable treatment by the Act) or litigation (which, Bergman suggests, the Act disfavors). Bergman argues that this allegedly disparate treatment constitutes "viewpoint discrimination," and that his claim is not foreclosed by the Supreme Court's rejection of First Amendment challenges in *Ohralik* and *Went For It* because, according to Bergman, these decisions did not address the point. We do not agree.

In *Ohralik*, the Court held that the "State . . . constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." 436 U.S. at 449. The Court explained that

> in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment. . . . To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution . . . of the Amendment's guarantee with respect to the latter kind of speech.

Id. at 455-56. "The State does not lose its power to regulate commercial activity deemed harmful to the

public whenever speech is a component of that activity." *Id.* at 456. "While this does not remove the speech from the protection of the First Amendment . . . it lowers the level of appropriate judicial scrutiny." *Id.* As the trial judge in this case noted in her opinion, the Supreme Court explained in *Ohralik*, 436 U.S. at 457, that "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component."

Bergman argues that the Court's holding in *Ohralik* was based on a perceived presumption of "even-handed enforcement" as between practitioners and insurers. In so claiming, Bergman attributes to the Court a view that the Court did not express or hold. To be sure, the Court observed, in a footnote, that while "recognizing the importance of the State's interest in regulating solicitation of paying clients by lawyers, we are not unmindful of the problem of the related practice . . . of the solicitation of releases of liability by claims agents or adjusters of prospective defendants or their insurers." *Id.* at 459 n. 16. But recognizing the existence of this problem did not negate the Court's basic holding. Indeed, the Court was fully aware, when it upheld, against a First Amendment challenge, a ban on in-person solicitation by lawyers, that the prohibition which it sustained did not apply to the practices of insurers or their representatives. There is nothing in the Court's opinion in *Ohralik* which suggests that the outcome of that case is dependent on the extent of regulation by the state of the practices of insurance agents or adjusters, or of attorneys for prospective defendants.

Bergman also asserts that *Went For It* is distinguishable because, according to him, no claim of

viewpoint discrimination was raised in that case. Once again, we do not agree. In *Went For It*, as we have seen, the Supreme Court held that a Florida Bar rule prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for thirty days following an accident did not violate the First or Fourteenth Amendments. 515 U.S. at 620. The Court explicitly recognized that the rule which it sustained as constitutional "may prevent citizens from learning about their legal options, *particularly at a time when other actors opposing counsel and insurance adjusters may be clamoring for the victim's attention.*" *Id.* at 633 (emphasis added). The Court declined, however, to invalidate the Florida rule on the basis of these concerns, noting that the rule imposed only a limited restriction on the practices of personal injury lawyers and that there were many other ways in which accident victims could learn of the availability of legal representation, including advertising in the media, in the Yellow Pages, and in other directories. *Id.* at 633-34.[16]

The opinions in *Ohralik* and *Went For It* establish beyond peradventure that in both cases, the Supreme Court recognized the concerns which Bergman has expressed here, but rejected the notion that real or perceived regulatory inequality as between practitioners and insurers nullifies the authority of the state to restrict intrusive personal solicitation by practitioners and their agents, even where, as in *Went For It*, the proscribed solicitation was less intrusive than the practices at issue here. The Act, as we have noted, renders any release of liability executed within twenty-one days of an accident, without the

[16] Today, the Internet is also widely available.

benefit of legal counsel, voidable within fourteen days, and it requires that a release contain a conspicuous and separately stated notice of the releasing party's right to rescind. D.C.Code § 22-3225.14(d). In our view, this provision provides reasonable and constitutionally adequate protection to consumers from overreaching by insurers and their agents.

Although articulated differently, Bergman's claim of "viewpoint discrimination" is similar in principle to the unsuccessful argument in *Capobianco*, to the effect that a prohibition against solicitation which applied to chiropractors but not to medical doctors denied chiropractors the equal protection of the law. Presumably, a chiropractor who solicits a patient's business "advocates" that the patient be treated by a chiropractor, whereas a hypothetical doctor who engages in such activity "advocates" medical treatment. Nevertheless, the court in *Capobianco* sustained the challenged regulation because there was evidence that chiropractors engaged in solicitation, to the detriment of prospective patients, while there was no comparable record of objectionable solicitation by medical doctors. *Capobianco*, 377 F.3d at 564-65. Bergman's claim in this case likewise fails, in part for a similar reason. The intrusive conduct that has caused the harm at which the Act is aimed is that of practitioners and their agents and runners, and it is the intrusion, and not the "message," at which the Act is aimed.

Bergman argues, and we agree, that "[v]iewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rectors*

and Visitors of the Univ. of Virginia, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). But read as a whole, the Act is demonstrably aimed at unwanted and intrusive in-person contacts, rather than at any "specific motivating ideology" or particular viewpoint. This is evident from what ispermitted and what is forbidden. The Council restricted in-person solicitation by practitioners who do not have preexisting relationships with victims of accidents, but the Act permits persons who do have such relationships—whether they are insurers or their agents or practitioners who represent victims—to initiate such contacts. D.C.Code § 22-3225.14(a)(1) & (2). The obvious justification for this distinction is that a communication from a person with whom the victim has a prior relationship is less likely to be harassing, exploitive, or intrusive than an unsolicited contact from someone whom the victim does not know. Thus, because the Act is directed at intrusive practices, and not at any viewpoint, the Council's different treatment of different problems does not render it invalid. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Rock Against Racism*, 491 U.S. at 791. Moreover, as we have noted, the demonstrated need for protection from uninvited visits or telephone calls by numerous practitioners and their agents substantially outweighs any perceived necessity for restricting unwanted contacts initiated in a given case by, at most, one or two insurers.

In *R.A.V.*, on which Bergman relies, the Court held that a St. Paul, Minnesota ordinance which prohibited the display of any symbol which "arouses anger,

alarm or resentment in others on the basis of race, color, creed, religion or gender" violated the First Amendment. 505 U.S. at 380. The Court reasoned that by linking the offensive display or symbol to the five enumerated categories, St. Paul had imposed "special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391. Moreover, the Court concluded, unsurprisingly, that the primary effect of the ordinance was to regulate speech. *Id.* at 394. But the Court also reiterated that commercial speech receives less protection than political speech,[17] noting that a "State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater." *Id.* at 388. In *Went For It*, decided three years after *R.A.V.*, the Court upheld, against a First Amendment challenge, a Florida regulation, similar to, though more restrictive than, the Act,—a result that the Court could not have reached if the decision in *R.A.V.* compelled the conclusion that in-person solicitation of accident victims constitutes activity protected by the First Amendment. 515 U.S. at 620.[18]

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[17] Significantly for present purposes, the Court cited *Ohralik* in support of this proposition.

[18] In 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), the Court, in invalidating a blanket ban on advertising the retail price of alcoholic beverages, differentiated that case from *Went For It*, in which, as the Court pointed out, it had upheld "a 30 day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers." *Id.* at 501-02. In this case, attorneys in the District of Columbia have even more channels of communication open to them under the Act than their Florida counterparts had in *Went For It*. In any

Complaining of the Act's restriction on practitioners' access to police reports unless they agree to abide by the twenty-one-day restriction on some in-person solicitation, Bergman argues that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). We agree without reservation with the principle articulated in *Cornelius*, but we do not believe that it has any bearing on this case. The Act was not designed "solely," or even partially, to suppress a viewpoint that Bergman espouses. Rather, it protects accident victims from intrusive conduct designed to induce them to enter into a commercial transaction with the practitioner who is engaging in the solicitation.

D. *Limitation of Time for Unrepresented Clients to Revoke Releases or Settlements*

Bergman complains that the Act provides only fourteen days in which an accident victim may void a release executed during the twenty-one day period in which some in-person solicitation is prohibited. D.C. Code § 22-3225.14(d)(1). He implies that the Council created an illusory remedy for an unrepresented accident victim in order to disguise its true agenda of creating an unfair advantage for insurers and their agents. This suggestion is altogether unpersuasive.

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event, the issues in the present appeal-which involves a limited proscription against uninvited efforts to enter into a commercial transaction with a prospective client—are far closer to the issues presented in *Ohralik* and *Went For It* than they are to those in *44 Liquormart* or in *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (a decision on which Bergman also relies).

We agree with counsel for the Council Members who, relying on *Hornstein*, 560 A.2d at 533, argue that to lend any credence to the charge that the Council "engaged in Machiavellian tactics would turn on its head the mandate that the court presume the validity of the challenged law[19] and the good faith of the legislature in enacting it."

The reality is less sinister than Bergman suggests. Members of the Council, like the Supreme Court in *Ohralik* and *Went For It*, were aware that even a narrowly drawn proscription against in-person solicitation could lead some accident victims to enter into settlements, or to execute releases from liability, at a time when they were not represented by counsel and did not know their rights. It was for that reason that the Council included in the statute a provision permitting an unrepresented client to rescind such an agreement within fourteen days after executing it. Indeed, in conformity with an amendment proposed by Council Member Kwame Brown, the period was increased from seven business days, as originally proposed, to fourteen calendar days, because "[t]he number of days after signing a release without the benefit of legal counsel in which an injured party may exercise the voidability clause should be longer to ensure that the injured party has ample time to exercise that option."

In any event, the Act permits direct-mail solicitation by practitioners at any time, and it allows in-person solicitation by practitioners with whom the prospective client has a prior relationship. There is thus *no* period during which a practitioner is prevented from communicating with the victim of an

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[19] But *cf.* note 7, *supra*.

accident victim. The victim's right to legal representation, if he or she ultimately chooses to employ counsel, is further protected by the requirement that any release "contain a notice of the claimant's right to rescind conspicuously and separately stated on the release." D.C.Code § 22-3225.14(d)(2). This is not the stuff of which a perverse hidden agenda to chill victims' exercise of their rights is made. The Council could have, and perhaps should have, given unrepresented victims the full twenty-one days to rescind uncounseled settlements or releases, but this is a question of legislative policy and the Council's decision should not be second-guessed by the judiciary.

In sum, we conclude that the Act is a reasonable exercise of the Council's police power, that it does not constitute viewpoint discrimination, and that it is consistent with the First Amendment.

III.

THE HOME RULE ACT

Bergman also contends that regulation of the conduct of attorneys practicing in the District of Columbia is solely the province of the District of Columbia Court of Appeals, and that the HRA so provides. He argues that the Act impermissibly intrudes upon this court's exclusive authority to regulate the practice of law, and that it runs afoul of separation of powers principles. We do not agree.

Under the HRA, "[t]he judicial power of the District is vested in the District of Columbia Court of Appeals and the Superior Court of the District of Columbia." D.C.Code § 1-204.31(a) (2001). There is no dispute that this court, as the highest court of the District of Columbia, has the inherent authority to regulate the practice of law, including the admission and discipline

of attorneys. "The great weight of authority renders it almost universally accepted that the highest court in the jurisdiction is imbued with the inherent authority to define, regulate, and control the practice of law in that jurisdiction." *Brookens v. Committee on Unauthorized Practice of Law*, 538 A.2d 1120, 1125 (D.C.1988); *see also Ex parte Burr*, 9 Wheat. 529, 22 U.S. 529, 530-31, 6 L.Ed. 152 (1824); *Sitcov v. District of Columbia Bar*, 885 A.2d 289, 295 (D.C.2005). The inherent authority of the judicial branch to discipline attorneys gives the court the "primary" power to do so. *Obrien v. Jones*, 23 Cal.4th 40, 96 Cal.Rptr.2d 205, 999 P.2d 95, 100 (Cal.2000). The existence of this "primary" power does not necessarily mean, however, that the legislature is precluded from playing any role in the regulation of the conduct of attorneys and of the practice of law. *Id.*; *see also In re Bozarth*, 178 Okla. 427, 63 P.2d 726, 728-29 (Okla.1936), and authorities there cited.

As correctly noted by the trial judge, the issue presented here is whether, in the District of Columbia, this court's authority to regulate the legal profession is not only inherent, but also exclusive. Specifically, we must decide whether the Council is prohibited from exercising its police power to address matters (such as the protection of residents of the District from intrusive conduct and harassment by practitioners) that would otherwise indisputably be within its legislative purview, when the legislation in question also restricts the professional conduct, *inter alia*, of attorneys.

In support of his theory that this court's authority over the conduct of attorneys is exclusive, Bergman cites a provision in Title VI of the HRA, D.C.Code § 1-206.02(a)(4), which states that the Council shall

have no authority to "[e]nact any act, resolution, or rule with respect to any provision to Title 11 [of the D.C.Code] (relating to organization and jurisdiction of the District of Columbia courts)."[20] On its face, the Act does not affect the organization or jurisdiction either of this court or of the Superior Court. The HRA further provides that "[t]he District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and exclusion." D.C.Code § 11-2501(a). By its terms, that provision simply confirms the existence of this court's inherent authority over admission and discipline of attorneys. Bergman in effect asks us, however, to read § 11-2501(a) and § 1-206.02(a)(4) together in such a way that the whole exceeds the sum of its parts. According to Bergman, these two provisions, in combination, confer upon this court the exclusive authority to take any action which would restrict in any way the conduct of attorneys in the practice of law.

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[20] Title VI of the HRA, of which § 1-206.02 is a part, is headed "Reservation of Congressional Authority." The authority of Congress to legislate for the District of Columbia is set forth in Article I of the Constitution. In the HRA, Congress broadly delegated legislative authority to the Council, but Congress also reserved to itself the right to enact legislation for the District of Columbia on any subject, notwithstanding that delegation.

> This case, however, does not present any issue as to which body-Congress or the Council of the District of Columbia-is authorized to legislate on a particular subject. *Cf. In re Prosecution of Crawley*, 978 A.2d 608, 620 (D.C.2009) (holding that the Council has no authority to legislate with respect to the powers of the United States Attorney). The issue here is whether the Council, in passing the Act, intruded upon the *judicial* role.

The trial judge discerned no basis in the HRA for the proposition that this court's authority is not only inherent but also exclusive. She noted that D.C.Code § 1-206.02(a)(4) precludes the Council from amending the fundamental organization and jurisdiction of the District of Columbia courts, which were established by Congress in 1970.[21] But this court and the United States Court of Appeals for the District of Columbia Circuit have consistently held, and the trial judge reiterated in her opinion in this case, that restrictions on the legislative authority of the Council in § 1-206.02(a)(4) must be narrowly construed, so as not to thwart the paramount purpose the HRA, namely, to "grant to the inhabitants of the District of Columbia powers of local self-government." D.C. Code § 1-201.02(a) (2008). *See, e.g., District of Columbia v. Sullivan*, 436 A.2d 364, 366 (D.C.1981) (holding that the Council has the authority to provide for the administrative adjudication of certain traffic offenses); *Dimond v. District of Columbia*, 253 U.S. App. D.C. 111, 120-22, 792 F.2d 179, 189-90 (1986) (holding that the Council's limitation on the right to bring a tort action for certain non-economic losses was not an impermissible alteration of the jurisdiction of the Superior Court).

Although the text of the provisions cited by Bergman provides scant support for his position, he bases his argument in substantial part on certain language appearing in two of our cases, *Banks II*, 634 A.2d 433,

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[21] Sections 11-2501 and -2502 were enacted as part of the Court Reform and Criminal Procedure Act of 1970, and they took effect on April 1, 1972. Prior to that time, disciplinary authority over members of the Bar was vested in the United States District Court for the District of Columbia. *See Sitcov*, 885 A.2d at 295 n. 7; *In re Keiler*, 380 A.2d 119, 124 (D.C.1977).

and *Banks III*, 805 A.2d 990. The language on which Bergman relies suggests that this court's authority to regulate the practice of law in the District of Columbia is exclusive as well as inherent. According to Bergman, these decisions preclude enactment of any legislative restriction on the solicitation of clients by attorneys. Although each of these opinions contains inaccurate dictum which, when read in isolation, ostensibly lends some support to Bergman's position, neither case presented any issue relating to the supposed exclusivity of this court's authority over members of the Bar. Indeed, Simon Banks, the appellant in all of the Banks cases, was not a lawyer at all.

In *Banks II*, Banks argued that the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") exceeded its statutory authority by holding that he had committed unfair trade practices, in violation of the Consumer Protection Procedures Act ("CPPA"), D.C.Code § 28-3904. 634 A.2d at 436. Banks had graduated from law school, but he was never admitted to the Bar. *Id.* at 435. In *In re Banks*, 561 A.2d 158, 167 (D.C.1987) (*Banks I*), this court had previously held that Banks had engaged in the unauthorized practice of law, and Banks was enjoined from practicing law or holding himself out to the public as someone authorized to practice law in the District. That injunction precluded him from representing that he was a "lawyer," or "attorney," "counsel," "advocate," "administrative advocate," "administrative law judge," or "administrative trial advocate." *Id.* at 168.

Apparently undaunted, Banks attempted to circumvent the decision in *Banks I*. Two years after the injunction was entered, the DCRA initiated an administrative proceeding against Banks for unfair trade practices, alleging that Banks had described

himself to a client in an employment discrimination case as an "administrative advocate." *Banks II*, 634 A.2d at 435. Banks argued that only this court had jurisdiction over issues concerning the unauthorized practice of law. *Id.* at 436. We held in *Banks II* that although this court has the authority to take action against such unauthorized practice, our authority to do so is not exclusive. *Id.* at 437. We concluded that the DCRA was not precluded from proceeding against non-lawyers who were accused of deceptive or unfair trade practices by misrepresenting themselves as being attorneys. *Id.* The professional services of attorneys are exempted from the CPPA, D.C.Code § 28-3903(c)(2)(c), but we held that Banks, as a non-lawyer, could not rely on that exclusion. *Id.* The fact that the unfair trade practice in which Banks had allegedly engaged consisted of pretending to be an attorney did not affect the DCRA's jurisdiction over his case. *Id.*

In *Banks II*, this court distinguished Banks' situation from that of a member of the Bar, and a sentence in our opinion in *Banks II*, subsequently reiterated in *Banks III*, forms the primary basis for Bergman's argument that the Act conflicts with the HRA. Specifically, we stated in *Banks II* that this court "has the 'inherent *and exclusive* authority to define and regulate the practice of law in the District of Columbia.'" 634 A.2d at 436 (citing *Brookens*, 538 A.2d at 1125) (emphasis added). Bergman asserts that the reference in *Banks II* to this court's supposedly exclusive authority to regulate the practice of law was a part of our holding, and therefore not dictum, even though the case concerned a non-lawyer. He so claims because this court distinguished its "exclusive" authority over lawyers from its authority over the unauthorized practice of law, which is not

exclusive, and he contends that the articulation of this distinction was a part of our holding. The trial judge in the present case rejected this argument, stating that it "proves too much." We agree with the trial judge.

The issue in *Banks II* was whether the CPPA applied to Banks' activities when he was purporting to practice law. We rejected Banks' circular argument that his unauthorized practice of law shielded him from liability under the CPPA, based on the statutory exemption for professional activities of attorneys. 634 A.2d at 437. Had he been an attorney, then the CPPA indisputably would not have applied to him. The applicability of the CPPA to Banks did not turn on the nature of this court's regulatory power over the professional conduct of members of our Bar. Indeed, the case had nothing at all to do with that issue.

Further, the description in *Banks II* of this court's authority as exclusive was based on a misconception of what the court in *Brookens* had decided and said. The language in *Brookens* about exclusivity was a summary of the argument advanced by the Committee on Unauthorized Practice of Law to this court in that case, and it was not a part of the ruling of the court.[22]

[22] For the reader's convenience, we detail in this footnote the error made in *Banks II* and repeated in *Banks III*. In *Banks II*, the passage purporting to rely on *Brookens* reads as follows:

> "This court has the 'inherent and exclusive authority to define and regulate the practice of law in the District of Columbia.'" *Brookens v. Committee on Unauthorized Practice of Law*, 538 A.2d 1120, 1125 (D.C.1988); *see* D.C.Code § 11-2501 et seq. (1989).
>
> *Banks II*, 634 A.2d at 436. This inaccurate reference to Brookens was repeated in *Banks III*, relying on *Banks II*:
>
> "This court has the 'inherent and exclusive authority to define and regulate the practice of law in the District of

Brookens, 538 A.2d at 1125. *Brookens* involved a challenge to a contempt citation against an attorney who was not a member of the District Bar, based on his unauthorized practice of law in the District. *Id.* at 1121-22. Some of Brookens' activities involved the representation of clients in court, but he had also appeared on behalf of clients before the District of Columbia Rental Accommodations Office. *Id.* at 1121. The rules of that Office permitted lay representation. *Id.* at 1125. This court affirmed the trial judge's contempt adjudication without resolving the question of whether an administrative agency's adoption of regulations permitting lay representation was in conflict with our "inherent power to define and regulate the practice of law." *Id.* at 1127. The opinion in *Brookens* described this court's authority as "inherent," but did not characterize it as "exclusive." *Id.*

Banks III concerned civil and criminal contempt proceedings arising out of enforcement of the injunc-

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Columbia.'" *Banks II*, 634 A.2d at 436 (quoting *Brookens v. Committee on Unauthorized Practice of Law*, 538 A.2d 1120, 1125 (D.C.1988), and citing D.C.Code § 11-2501 *et seq.*).

865 A.2d at 997.

The language that actually appeared in Brookens was as follows:

> Second, *the Committee [on Unauthorized Practice] argues that this court, pursuant to D.C.Code § 11-2501(a) (1981), has the inherent and exclusive authority to define and regulate the practice of law in the District of Columbia.* The Committee asks us to find that our statutory authority to promulgate rules with respect to the practice of law in the District, D.C.Code § 11-2501, supersedes a local agency's statutory authority to adopt procedures governing the qualifications of those persons who represent parties in proceeding before the agency. D.C.Code § 1-1503 (1981).

538 A.2d at 1125. (Emphasis added) (footnote omitted).

tion that had been entered in *Banks I*, 805 A.2d at 993-97. In that case, this court repeated the inaccurate dictum from *Banks II*, purportedly based on *Brookens*, regarding this court's supposedly exclusive authority to define and regulate the practice of law in the District of Columbia. 805 A.2d at 997. Like *Banks II*, however, *Banks III* had nothing at all to do with the issue before us here, namely whether the legislative branch, in the exercise of its police power, is precluded by the HRA from enacting an otherwise valid statute which restricts, *inter alia*, certain practices by members of the Bar.

Bergman also cites *Kennedy v. Educational Testing Serv., Inc.*, 393 A.2d 523 (D.C.1978), but that decision provides him with no solace. In *Kennedy*, we held that this court—and not the Superior Court-had subject matter jurisdiction over a complaint relating to the multistate bar examination and, in particular, over the refusal of the Educational Testing Service ("ETS") to permit review of the scoring of that examination. *Id.* at 524-25. We reasoned that with regard to the multistate examination, ETS was functioning as an agent of the Committee on Admissions of the District of Columbia Court of Appeals. *Id.* at 525. The only purpose of the requested disclosure, as Kennedy himself acknowledged, concerned the decision of the Committee on Admissions not to certify Kennedy to the Court of Appeals for admission to the Bar—a function which is indisputably within this court's exclusive authority. *See* D.C.Code § 11-2501. No issue under the HRA was raised.[23]

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[23] *See also Sitcov*, 885 A.2d at 295, in which we held that this court's authority over the practice of law in the District of Columbia included original jurisdiction to review a decision by the Board of Governors of the District of Columbia Bar - an

Bergman further invokes separation of powers principles in support of his claim that the Council has violated the HRA. On its face, however, the Act is an exercise of the Council's police power to enact legislation for the protection of residents of the District of Columbia from intrusive and exploitive practices. It does not affect the organization or jurisdiction of the District of Columbia courts, nor does it interfere with this court's authority over Bar admission or attorney discipline. Moreover,

> [s]imply because certain conduct is subject to professional discipline is no reason why the legislature may not proscribe the conduct. Under the police power the legislature may enact penal legislation that affects the legal profession just as it can with regard to other occupations and professions.

Pace v. State of Florida, 368 So.2d 340, 345 (Fla.1979).

Nevertheless, Bergman contended in the trial court, and reiterates on appeal, that the Act directly conflicts with, and effectively reverses, a policy judgment made by this court promulgating Rule 7.1 of the Rules of Professional Conduct. Rule 7.1 does not impose a specific time restriction on in—person solicitation by lawyers of potential clients, but it does preclude a

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"arm of the court"—to suspend a member of the Bar for nonpayment of Bar dues, and to reinstate that lawyer prospectively upon payment of the delinquent dues and associated penalties. In *Sitcov*, we referred to Section 11 2501 and to this court's "inherent authority" to regulate the practice of law in this jurisdiction, *id.* at 297 (citing *Brookens*, 538 A.2d at 1125), but we said nothing suggesting that this power was exclusive or that the subject was "off limits" to the legislature. As in *Kennedy*, this court made no mention in *Sitcov* of the powers of the Council under the HRA.

lawyer from engaging in in—person solicitation that involves the "use of undue influence," and it prohibits such solicitation if the "potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer." *See* Rule 7.1(b)(2) & (3) of the Rules of Professional Conduct. The Rule also prohibits use of an intermediary to solicit clients in certain circumstances involving "the use coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct." Rule 7.1(b)(5).

The trial judge recognized that the intrusive conduct on the part of attorneys which is addressed by Rule 7.1 was also a primary focus of the Council in its consideration and eventual passage of the Act. Nevertheless, she concluded that this court's inherent and statutory authority to regulate the practice of law in the District of Columbia is not "exclusive"

> in the sense that it would preclude the Council from enacting legislation pursuant to its police powers that might also affect the conduct of lawyers in some respect. Even if there is an overlap between the authority of the Court of Appeals to regulate the practice of law by members of the District of Columbia Bar and the authority of the Council to enact legislation to protect against invasions of privacy and harassment of accident victims and consumers in the District of Columbia, those overlapping powers only constitute a violation of separation of powers if the intruding branch "impermissibly undermines the powers" of the other branch or "disrupts the proper balance between the coordinate branches by preventing the [allegedly intruded on] branch from accom-

> plishing its constitutionally assigned functions." *Hessey v. Burden*, 584 A.2d 1, 5 (D.C.1990) (internal citations omitted); *see also Morrison v. Olson*, 487 U.S. 654, 693-94, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

(Some internal quotation marks omitted). We agree with the trial judge.

In our view, the Council's passage of the Act, in the exercise of its power to enact legislation of general applicability, does not impermissibly burden or unduly interfere with this court's authority to exercise its core functions relating to Bar admission and the discipline of attorneys. *See Hessey*, 584 A.2d at 6. With the exceptions previously mentioned, the Act does preclude practitioners, including (but not limited to) attorneys, from in—person solicitation of accident victims for twenty-one days, and the Rules of Professional Conduct do not include such an absolute time-bound restriction. But the trial judge held, and again we agree, that the Council's enactment of this

> [n]arrowly drawn anti-fraud criminal and consumer protection statute intended to protect against harassment of motor vehicle accident victims, and the invasion of their privacy, in the immediate aftermath of an accident, does not unduly burden the Court of Appeals in the exercise of its core functions. To the contrary, it does not appear that the Act limits the authority or ability of the Court of Appeals to carry out its functions with regard to Bar admission, attorney discipline or the regulation of the practice of law in the District of Columbia in any significant

> way. The Act therefore does not violate the separation of powers doctrine.[24]

Especially in the absence of textual or other persuasive support for Bergman's proposed construction of the HRA well beyond its express terms, we believe that it would be an inappropriate exercise of judicial power to restrict the legislative authority of our elected representatives in the manner that Bergman suggests.

IV.

CONCLUSION

For the foregoing reasons, the judgment is *Affirmed*.

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[24] In a footnote, the trial judge also warned of the potential consequences of the lack of any reasonable limiting principle to Bergman's position:

> The logical extension of the plaintiff's argument is that the Council could not legislate on any subject affecting the public welfare, if that conduct related to the practice of law by lawyers. Such an interpretation would preclude prosecution of a lawyer for failing to pay taxes on income derived from his or her law practice, or, as the Council defendants note, for theft or client funds. It also goes against the long-standing principle, discussed above, that restrictions on the Council's legislative authority are to be narrowly construed.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Docket No. 06 CA 7992
Calendar 7
Judge Bartnoff

SCOTT N. BERGMAN, ESQ.
Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*
Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTIONS FOR INJUNCTIVE RELIEF

Plaintiff Scott Bergman, an active member of the District of Columbia Bar, has brought this case to challenge the validity of the White Collar Insurance Fraud Amendment Act of 2006 ("the Act"), which amended statutes codified at D.C. Code §§ 22-3225.01 *et seq.* and 5-113.06. Mr. Bergman claims that the Act violates both the District of Columbia Home Rule Act and the First Amendment of the United States Constitution, and he is asking the Court for declaratory and injunctive relief against the District of Columbia, the Mayor of the District of Columbia, and the Council of the District of Columbia ("the Council").[1]

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[1] The plaintiff also claimed that the Metropolitan Police Department improperly had refused to provide accident reports

Defendants District of Columbia and the Mayor of the District of Columbia have filed a motion to dismiss, or in the alternative, for summary judgment, as have the Council defendants. When a court considers material outside the Complaint in deciding a motion to dismiss for failure to state a claim on which relief may be granted, under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure, the motion is treated as a motion for summary judgment, under Rule 56. *See Washkoviak v. Sallie Mae*, 900 A.2d 168, 177 (D.C. 2006) (internal citations omitted). The parties have relied on matters outside the Complaint in support of and in opposition to the motions to dismiss, and the Court will treat those motions as if they were filed under Rule 56.

The plaintiff also has filed a motion for an injunction to prevent enforcement of the Act against attorneys and their employees. The motions have been fully briefed, and the Court has heard oral argument from counsel for all parties.

I.

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact and that it therefore is entitled to the entry of a judgment in its favor as a matter of law. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001); Super. Ct. Civ. R. 56(c). In reviewing a motion for summary judgment,

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to him, purportedly under the authority of the Act. The defendants acknowledged that there may have been some confusion regarding implementation of the Act, but the Metropolitan Police Department issued a Special Order on August 11, 2006 to alleviate that confusion. (Council Exhibit B.) The Court does not understand that the plaintiff is continuing to press that claim or any claim under the Freedom of Information Act.

the trial court must view the pleadings and other materials submitted in the light most favorable to the non-moving party, and the motion may be granted only if a reasonable jury, drawing all reasonable inferences in favor of the non-moving party, could not find for the non-moving party based on the evidence in the record. *Grant*, 786 A.2d at 583 (citing *Nader v. De Toledano*, 408 A.2d 31, 42 (D.C. 1979)); *Bailey v. District of Columbia*, 668 A.2d 817, 819 (D.C. 1995). The moving party has the initial burden of proving that there is no issue of material fact in genuine dispute. If the moving party carries that initial burden, the non-moving party then assumes the burden to establish that there is a genuine issue of material fact in dispute. *Grant*, 786 A.2d at 583 (citing *O'Donnell v. Associated Gen. Contractors of America, Inc.*, 645 A.2d 1084, 1086 (D.C. 1994)). The non-moving party may not merely rely on the allegations in its pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Super. Ct. Civ. R. 56(e).

The parties essentially agree that this case does not turn on factual issues, but rather is a legal challenge to the Act, under the United States Constitution and the Home Rule Act, which in part is the equivalent of a State Constitution for the District of Columbia. It is well-settled that "a strong presumption of constitutionality inheres in legislative enactments not easily overborne by a challenging party." *McNeely v. United States*, 874 A.2d 371, 380 (D.C. 2005). To succeed in such a challenge, a party must make a compelling showing of the repugnancy between the questioned law and the Constitution beyond a reasonable doubt. *Hornstein v. Barry*, 560 A.2d 530, 533 (D.C. 1989) (citing *Bernadin v. Seymour*, 10 App. D.C. 294, 305 (1897)). The reasons for requiring such a stringent standard are grounded in the traditional

doctrine of separation of powers, which "restrains courts from inappropriate interference in the business of the other branches of Government." *District of Columbia v. Sierra Club*, 670 A.2d 354, 366 (D.C. 1996). As the District of Columbia Court of Appeals has explained, "judicial intervention is generally unwarranted no matter how unwisely we may think that a political branch has acted." *Hornstein*, 560 A.2d at 533 (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). The stringent standard articulated by the Court of Appeals in *Hornstein* properly is applied to the plaintiff's claims in this case.

II.

The White Collar Insurance Fraud Amendment Act was intended to address the perceived problem of revictimization of motor vehicle accident victims by persons aggressively soliciting them as clients, patients or consumers in the immediate aftermath of an accident. In particular, the Act provides that "it is unlawful for a practitioner, whether directly or through a paid intermediary, to solicit for financial gain a client, patient or customer within 21 days of a motor vehicle accident with the intent to seek benefits under a contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident." D.C. Code § 22-3225.14 (a)(1) (2008). A "practitioner" under the Act is "a person, licensed to practice a profession or trade in the District, whose services are compensated either in whole or in part, directly or indirectly by insurance proceeds." D.C. Code § 22- 3225.01 (9) (2008). The Act was intended to apply to attorneys, health care professionals, and

others licensed to practice a trade or profession in the District of Columbia.[2]

The Act does not prohibit all contact by attorneys and other practitioners with motor vehicle accident victims within 21 days of an accident. There is no restriction on direct mail solicitation within the 21 day period.[3] In addition, practitioners with a prior personal or business relationship with the accident victim may make contact with the victim in person or by telephone immediately after the accident.

The Act further limits the release of motor vehicle accident reports maintained by the Metropolitan Police Department within 21 days of an accident. Those reports may be released during that period only to persons who present identification and attest that they are eligible to obtain the report, under D.C. Code §§ 22-3225.14 and 5-113.06 (a).

III.

At oral argument, counsel for the plaintiff acknowledged that this case involves commercial speech—a conclusion essentially mandated by Supreme Court precedent. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Ohralik v. Ohio State Bar Assn.*, 436

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[2] *See* Explanation of Bill 16-208 (White Collar Insurance Fraud Amendment Act of 2006), Amendment in the Nature of a Substitute (February 7, 2006), attached to the Council defendants' motion as Council Exhibit A.

[3] The record reflects that the plaintiff has availed himself of this provision and has sent written solicitations to accident victims within one day of an automobile accident, subsequent to passage of the Act. But there is no question that the Act prohibits direct solicitation activities that the plaintiff had engaged in on a regular basis, including "cold calls" to accident victims immediately after the accident.

U.S. 447 (1978). Commercial speech is accorded a level of protection under the First Amendment "commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Went For It*, 515 U.S. at 623 (internal citations omitted). Restrictions on commercial speech are subject to "intermediate" scrutiny, under the framework set out by the Supreme Court in *Central Hudson Gas v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980). Under *Central Hudson*, governmental regulation of commercial speech is permissible if it satisfies a three-pronged test: (1) the government must assert a substantial interest in support of the regulation; (2) the challenged restriction must directly and materially advance that governmental interest; and (3) the restriction must be narrowly drawn. *Id.* at 564-565.

In *Went For It*, the Supreme Court applied the Central *Hudson* test to restrictions on lawyer solicitation of motor vehicle accident victims imposed by a Florida Bar rule that was adopted by the Florida Supreme Court. The Florida Bar rule prohibited targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster —a regulation more restrictive than the Act challenged here, which does not preclude or restrict such targeted mailings to accident victims.

On the first prong of the *Central Hudson* test, the Florida Bar asserted that it had a substantial interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers," in order to curb activities that had a negative effect on the administration of justice and to preserve the integrity

and reputation of the legal profession. 515 U.S. at 624-625. The Supreme Court had "little trouble" crediting that interest as substantial, and particularly noted its consistent holdings that "'the protection of potential clients' privacy is a substantial state interest.'" *Id.* at 625 (quoting *Edenfield v. Fane*, 507 U.S. 761, 769 (1993)). The Court also found that the Florida Bar had established that the restriction was targeted at a concrete, non-speculative harm and would address that harm in a direct and material way, so as to satisfy the second prong of the *Central Hudson* test. Finally, the Court found that the restriction was reasonably well-tailored to its stated objectives, particularly given that it was limited to a "brief 30-day period." *Id.* at 633.

The Supreme Court's application of the *Central Hudson* factors to the Florida Bar's 30-day restriction on targeted direct mail solicitation of accident victims and their relatives in *Went For It* is particularly instructive to this Court in its consideration of the plaintiff's First Amendment challenge to the Act. With regard to the first prong, the Council of the District of Columbia stated its concerns for the privacy of accident victims and the importance of protecting them from harassment by runners and others, including lawyers, soliciting them in the immediate aftermath of an accident. The Committee Report on the legislation states the intent of the legislation is "to protect accident victims from coercive solicitation tactics at a time when they are especially vulnerable." Council of the District of Columbia, Committee on the Judiciary, Report on Bill 16-208, the "White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2005" (November 8, 2005) (Council

Exhibit D.)[4] The bill also is described as a consumer protection measure.[5] Those interests are similar to the interests upheld by the Supreme Court in the case of the Florida Bar rule.[6] The privacy of citizens of the District of Columbia and consumer protection both are substantial governmental interests.

To satisfy the second prong of the *Central Hudson* test, the restriction on commercial speech in the Act must target a non-speculative harm and must address that harm in a direct and material way. The Florida Bar conducted a two-year study of the effects of lawyer advertising on public opinion, and the

[4] The bill that eventually passed the Council was further amended, based on testimony and other comments received by the Judiciary Committee from a variety of interested members of the public, as well as the U.S. Attorney's Office and the Trial Lawyers' Association. *See* Council Exhibit C.

[5] The Act delineated between first and second degree felony insurance fraud and established the offense of misdemeanor insurance fraud. It also included a provision under which an accident victim who executes a release of liability pursuant to a settlement of a personal injury claim within 21 days of an accident, without the benefit of legal counsel or guidance, may void the release for 14 days after it is executed.

[6] The Florida Bar rule also was justified in part as an effort to address the negative public perception of the legal profession arising from aggressive solicitation of accident victims. In contrast, the Act now before the Court applies to practitioners, including but not limited to lawyers. The Committee Report and the testimony before the Committee were not addressed to the regulation of the legal profession, as such, but instead to the protection of vulnerable accident victims from harassment and coercive solicitation tactics. Although most of the comments and information submitted to the Council on the bill appear to have focused on lawyers and runners working on behalf of lawyers, the legislative history and press reports provided to the Council also refer to intrusive contacts made with accident victims on behalf of other practitioners, including chiropractors.

restriction on direct mail solicitation was imposed based on the results of that study. The Council of the District of Columbia did not undertake a comparable study. But it did rely on some of the same types of information that the Supreme Court found were sufficient to support the Florida Bar rule. The Council considered the bill for nearly a year. The Committee on the Judiciary held a public hearing on the bill, and it reviewed testimony and statements from members of the public, the insurance industry, government representatives, the Trial Lawyers Association, and the Bar Association of the District of Columbia. It also reviewed articles on the issue—particularly articles about harassment of accident victims by "runners"—that were published in the press.[7] In finding that the Florida Bar rule satisfied the second prong of the *Central Hudson* test, the Supreme Court approved reliance on similar anecdotal complaints from citizens and on press articles and editorials. *See Went For It*, 515 U.S. at 627-628.

The plaintiff's response to the defendants' showing regarding the nature of the harm addressed by the Act is simply to assert that the harm is speculative. The record reflects, to the contrary, that the Act was addressed to concrete harms that were documented to the Council by a variety of sources. The Act's prohibition on in-person solicitations for 21 days following an accident directly and materially addresses the harm to accident victims from such personal solicitations in the immediate aftermath of an accident.

[7] Some of those articles and of the submissions to the Council are attached as exhibits to the defendants' motions. Those materials document the invasion of privacy and harassment of victims by runners and lawyers, in particular, in the immediate aftermath of motor vehicle accidents.

Further, the Act is narrowly drawn to further its objectives. According to the Report of the Judiciary Committee, the bill as originally drafted would have restricted in-person solicitations for 30 days a time period the Supreme Court in *Went For It* found to be a reasonable restriction to address the same harms targeted by Act—but the Committee reduced that period to 21 days, based on comments received from stakeholders at a meeting convened by the Department of Securities, Insurance and Banking at the Committee Chairman's request. Further, unlike the Florida Bar, the Council did not restrict direct mail solicitations, but instead limited its restriction to in-person and telephone contacts, which were found to be more invasive than direct mail or general advertising. The Act applies only to in-person solicitation of motor vehicle accident victims and does not restrict solicitation by practitioners of other potential clients or customers, in other contexts. Solicitations by practitioners with a pre-existing business or personal relationship with an accident victim are permitted, without restriction. The Act is in no way a blanket prohibition, but instead is narrowly drawn to address the specific interests it was intended to protect. It therefore also meets the third prong of the *Central Hudson* test.

Finally, the plaintiff argues that despite the clear Supreme Court precedent that permits the type of restriction on commercial speech at issue here, the Act somehow constitutes viewpoint discrimination in violation of the First Amendment. That argument apparently is based on *R.A. V. v. City of St. Paul*, 505 U.S. 377 (1992). But *R.A.V.* was decided by the Supreme Court three years before the decision in *Went For It*, and even in *R.A.V.* itself, the Court recognized that state regulation of client solicitation by

attorneys for remuneration is not viewpoint discrimination. 505 U.S. at 388-389. The restriction at issue here is not aimed at the content of the speech, but at its secondary effects. As the Court explained in *Ohralik* "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component." 436 U.S. at 457. The restriction in the Act is not directed at the legal advice the plaintiff might be seeking to provide to a potential client in the immediate aftermath of a motor vehicle accident, but rather to the nature of the solicitation itself of the client for remuneration.[8]

Based on the foregoing, the Court finds that the Act's regulation of commercial speech is permissible, under the First Amendment.

IV.

The plaintiff also contends that regulation of the conduct of lawyers practicing in the District of Columbia is the sole province of the District of Columbia Court of Appeals, under the Home Rule Act, D.C. Code §§ 1-201 *et seq.* (2008). On that basis, the plaintiff argues that the Act impermissibly impinges on the exclusive powers of the Court of Appeals and violates separation of powers principles.

A.

As the defendants explain in detail in their briefs, the plaintiff's reliance on the Home Rule Act is overly

[8] The Supreme Court in *R.A.V.* also noted that no issue of content discrimination is raised where "there is no realistic possibility that official suppression of ideas is afoot." 505 U.S. at 390. There plainly is no such realistic possibility here, given that the restriction is only for 21 days and that contacts by mail are permitted even during that period.

simplified. Under the Home Rule Act, "[t]he judicial power of the District is vested in the District of Columbia Court of Appeals and the Superior Court of the District of Columbia." D.C. Code § 1-204.31 (a) (2008).[9] There is no dispute that the Court of Appeals, as the highest court of the District of Columbia, has the inherent authority to regulate the practice of law, including the admission and discipline of attorneys. *See Brookens v. Committee on Unauthorized Practice of Law*, 538 A.2d 1120, 1125 (D.C. 1988) ("The great weight of authority renders it almost universally accepted that the highest court in the jurisdiction is imbued with the inherent authority to define, regulate, and control the practice of law in that jurisdiction."). The issue presented here is whether that authority is not only inherent, but exclusive, so as to preclude the Council from exercising its police power to address matters that otherwise would clearly be within its legislative purview, if the legislation also restricts the professional conduct of attorneys.

The plaintiff bases his claim of exclusive authority on a further provision in Title VI of the Home Rule Act, codified at D.C. Code § 1-206.02 (a)(4), which provides that the Council shall have no authority to "[e]nact any act, resolution, or rule with respect to any provision of Title 11 [of the D.C. Code] (relating to organization and jurisdiction of the District of Columbia courts.)."[10] Under D.C. Code § 11-2501 (a),

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[9] The legislative powers of the Council of the District of Columbia are set forth in Section 1-204.04, and the executive powers of the Mayor are set forth in Section 1-204.22. The provisions of Title IV of the Home Rule Act, D.C. Code §§ 1-204.01-1-204.95 are the Charter of the District of Columbia.

[10] Title VI itself is headed "Reservation of Congressional Authority." The authority of Congress to legislate for the Dis-

"[t]he District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion."[11] On its face, that provision only confirms the inherent authority of the Court of Appeals regarding the admission, removal and discipline of attorneys. Nonetheless, the plaintiff would take that provision and Section 1- 206.02 (a)(4) together to create an exclusive authority in the Court of Appeals that would limit the ability of the Council to act in areas that otherwise would be within its legislative power if the legislation in any way would restrict the conduct of attorneys in the practice of law.

The Court finds no basis for that interpretation in the Home Rule Act itself. D.C. Code § 1-206.02 (a)(4) precludes the Council from amending the fundamental organization and jurisdiction of the District of Columbia courts, which were established by Congress

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trict of Columbia is included in Article I of the Constitution. In the Home Rule Act, Congress broadly delegated legislative authority to the Council, but Congress also reserved the right to enact legislation for the District of Columbia on any subject, notwithstanding that delegation. In addition, in D.C. Code § 1-206.02(a), Congress further reserved certain subject matter areas to itself and prohibited the Council from legislating in those areas.

[11] D.C. Code § 11-2502 sets out the grounds for the Court of Appeals to censure, suspend or disbar a member of it's Bar. Those grounds include "crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice." In addition, a fraudulent act or misrepresentation by an applicant for admission to the Bar in connection with the application or admission is sufficient cause for the revocation of the person's admission.

in 1970.[12] Both the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit consistently have held that the restrictions on the legislative authority of the Council in Section 1-206.02 (a)(4) are to be construed narrowly. *See, e.g., District of Columbia v. Sullivan*, 436 A.2d 364, 366 (D.C. 1981) (permitting the Council to provide for administrative adjudication of certain traffic offenses); *Dimond v. District of Columbia*, 792 F.2d 179, 189-90 (D.C. Cir. 1986) (limitation on right to bring tort action for certain non-economic losses is not an impermissible alteration of the jurisdiction of the Superior Court).[13]

The Council defendants also distinguish between the Charter of the District of Columbia (Title IV) and other titles of the Home Rule Act, including Title VI. The plaintiff argues that the powers of the Council, as set forth in the Charter in Section 1-204.04, are subject to the limitations of Sections 1-206.01-04, and therefore those limitations in Title VI are incorporated into the Charter. The Council defendants appear to have the better of the argument that Title IV's reference to certain provisions of Title VI is not the same as incorporation of those Title VI provisions into Title IV. But the larger point is that the limitations

[12] D.C. Code §§ 11-2501 and 2502 in their current form were enacted in the Court Reform and Criminal Procedure Act of 1970, and took effect on April 1, 1972. Prior to that time, disciplinary authority over members of the Bar was the responsibility of the United States District Court for the District of Columbia. *See Sitcov v. District of Columbia Bar*, 885 A.2d 289, 295 (D.C. 2005); *In re Keiler*, 380 A.2d 119, 125 (D.C. 1977).

[13] Limitations on the Council's legislative authority in other subsections of Section 1-206.02(a) similarly have been construed narrowly. *See, e.g., McIntosh v. Washington*, 395 A.2d 744, 752 (D.C. 1978).

on the Council's legislative authority are to be narrowly construed, and the plaintiff's interpretation instead would construe them expansively.

B.

The plaintiff relies on decisions from the Court of Appeals to support his position that the Court of Appeals' authority to regulate the practice of law in the District of Columbia precludes enactment of legislative restrictions on attorney solicitation of clients. The cases relied on by the Plaintiff are at best distinguishable from the instant case, and none of the cases cited address challenges to legislation enacted by the D.C. Council implicating the authority of the Court of Appeals. The principal cases the plaintiff relies on are *Banks v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 634 A.2d 433 (D.C. 1993) (*Banks II*) and *In re Banks*, 805 A.2d 990 (D.C. 2002) (*Banks III*). Simon Banks, the appellant in all the *Banks* cases, is not a lawyer, and neither of those cases is directly apposite to the issues presented in the instant case. A third case, *Brookens*, also involves the unauthorized practice of law. Finally, *Kennedy v. Educational Testing Service*, 393 A.2d 523 (D.C. 1978), involves matters directly relating to Bar admission, and therefore also is not applicable here.

In *Banks II*, Mr. Banks argued that the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") exceeded its statutory authority when it found that he had committed unfair trade practices, in violation of the Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3904. Mr. Banks graduated from law school but never was admitted to any Bar. The Court of Appeals previously had concluded that he had engaged in unauthorized practice of law and had enjoined him from practicing

law or holding himself out to the public as someone authorized to practice law in the District of Columbia. *In re Banks*, 561 A.2d 158 (D.C. 1987) (*Banks I*). That injunction precluded him from representing himself as a "lawyer," "attorney," "counsel," "advocate," "administrative advocate," "administrative law judge," or "administrative trial advocate." *Id.* at 168.

Two years after the injunction was entered in *Banks I*, DCRA initiated an administrative proceeding against Banks for unfair trade practices, based on services he had sought to provide to a client as an "administrative advocate" in an employment discrimination case. Banks argued that only the Court of Appeals had jurisdiction over issues concerning the practice of law. The Court of Appeals found, however, that although it had authority to take action against the unauthorized practice of law, that authority was not exclusive and did not preclude the DCRA from proceeding against non-lawyers who were accused of unfair trade practices when they purported to practice law. The professional services of lawyers are excepted from the CPPA, D.C. Code § 28-3903 (c)(2)(C), but Mr. Banks, as a non-lawyer, could not rely on that exclusion on the grounds that the unfair trade practices he allegedly had committed related to his misrepresentation of himself as a lawyer.[14]

The Court of Appeals in *Banks II* distinguished Mr. Banks' situation from that of a lawyer, and its statements in that case with regard to its authority to regulate lawyers are the primary basis for the

[14] The Council defendants note that nothing in the legislative history of the CPPA suggests that the exception for lawyers was based on separation of powers concerns. The CPPA also includes exceptions for members of the clergy and Christian Science practitioners. D.C. Code § 28-3903 (c)(2)(C) (2008).

plaintiff's argument that the Act conflicts with the Home Rule Act. In particular, the Court of Appeals stated that it "has the 'inherent and exclusive authority to define and regulate the practice of law in the District of Columbia.'" 634 A.2d at 436 (citing *Brookens*, 53 8 A.2d at 1125). The plaintiff argues that the Court of Appeals' reference in *Banks II* to its authority to regulate the practice of law is not *dicta*, even though that case concerned a non-lawyer, given that the Court of Appeals distinguished its "exclusive" authority over lawyers with its authority over the unauthorized practice of law, which is not exclusive. In context, however, that argument proves too much.

The issue in *Banks II* was whether the CPPA applied to Banks' activities when he was purporting to practice law.[15] The *Banks II* Court rejected Banks' circular argument that his unauthorized practice of law somehow shielded him from liability under the CPPA, based on the statutory exemption for professional activities of lawyers. Had he been a lawyer, there would have been no question that the CPPA would not have applied to him. The applicability of the CPPA to Mr. Banks in no way turned on the nature of the Court of Appeals' regulatory power over the professional conduct of lawyers.

Further, the description of the Court of Appeals' authority is stated as if it were the conclusion reached by the Court in the *Brookens* case. The cited language from *Brookens*, however, is a summary of the argument advanced by the Committee on Unauthorized Practice of Law to the Court of Appeals in

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[15] Banks also challenged the merits of the DCRA's findings that his actions constituted unfair trade practices in violation of the CPPA. The Court of Appeals upheld certain of those challenges, but not all of them.

that case, and not the determination of the Court. *Brookens*, 538 A.2d at 1125. *Brookens* involved a challenge to a contempt citation against an attorney who was not a member of the District of Columbia Bar, based on his unauthorized practice of law. Some of Mr. Brookens' activities involved representing clients in court, but he had also appeared as a representative of clients before the District of Columbia Rental Accommodations Office, which had promulgated rules permitting lay representation. The Court of Appeals affirmed the trial judge's contempt finding without resolving whether an administrative agency's adoption of regulations permitting lay representation was in conflict with the Court of Appeals' "inherent power to define and regulate the practice of law." *Brookens*, 528 A.2d at 1127. The actual ruling in *Brookens* described the Court of Appeals' authority as "inherent," but did not go so far as to call it "exclusive."[16]

Banks III concerned civil and criminal contempt proceedings arising out of enforcement of the injunction that had been entered in 1987 in *Banks I*. The Court of Appeals in that case repeated the language from *Banks II*, purportedly based on *Brookens*, regarding the authority of the Court of Appeals to define and regulate the practice of law in the District of Columbia, to place in context the Court's authority over the unauthorized practice of law. That language also is *dicta*. The issues presented in *Banks III* did not concern the nature of the Court of Appeals'

[16] The Court of Appeals also noted in *Brookens* that "[i]t is generally conceded that the constitutional or statutory power to control bar admissions and discipline of members entails the authority to control unauthorized practice," citing cases from other jurisdictions. 538 A.2d at 1125 n.13.

authority to regulate the activities of lawyers, but instead concerned the authority of the Court to enforce its own orders against unauthorized practice. 805 A.2d at 998-1000.

The plaintiff's reliance on *Kennedy v. Educational Testing Service* also is misplaced. In that case, the Court of Appeals found that it—and not the Superior Court —had subject matter jurisdiction to consider a complaint relating to the multistate bar examination and, in particular, the refusal of the Educational Testing Service ("ETS") to permit review of the scoring of the multistate examination. *Kennedy*, 393 A.2d 523. The Court reasoned that with regard to the multistate examination, ETS was functioning as an agent of the Committee on Admissions of the Court of Appeals. *Id.* at 525. Any order of the Superior Court directing disclosure of the multistate exam and its scoring would call into question the Court of Appeals and its Committee on Admissions' policies against such disclosure, and the Court of Appeals itself has authority (which it had exercised in the past) to entertain a petition for review of admissions examinations. *Id.* In addition, the only purpose of the requested disclosure, as Kennedy himself acknowledged, related to the Committee on Admissions' decision not to certify him to the Court of Appeals for admission to the Bar – a function clearly within the Court of Appeals' exclusive control. The Superior Court therefore had no subject matter jurisdiction to hold or declare invalid a policy of the Court of Appeals relating to that Court's plenary authority over Bar admissions, at least with regard to a request for disclosure of admissions examinations, contrary to

the rules of the Court of Appeals and its Committee on Admissions. *Id.*[17]

C.

On its face, the Act is an exercise of the Council's police power to enact legislation for the protection of personal privacy in the District of Columbia, as well as to protect consumers. The Act does not directly affect the organization or jurisdiction of the District of Columbia courts, nor does it interfere with the Court of Appeals' authority over Bar admission or attorney discipline. The plaintiff contends, nonetheless, that the Act violates the doctrine of separation of powers. He argues that the Act effectively reverses a policy judgment made by the Court of Appeals in promulgating Rule 7.1 of the Rules of Professional Conduct, in which the Court determined not to impose a specific time restriction on in-person solicitation by lawyers of potential clients. Rule 7.1 does preclude a lawyer from in-person solicitation that involves the "use of undue influence," or if the "potential client is apparently in a physical or mental

[17] The Council defendants note in their reply that the Court's analysis in *Kennedy* was based only on D.C. Code § 11-2501. Similarly, in *Sitcov*, the Court of Appeals held that its authority over the practice of law in the District of Columbia included original jurisdiction to review a decision by the Board of Governors of the District of Columbia Bar—an "arm of the Court"—to administratively suspend a member of the Bar for nonpayment of Bar dues and to reinstate that lawyer (on payment of the delinquent dues and associated penalties) retroactive to the date of payment, rather than to the date of suspension. *Id.* at 295. The Court of Appeals in *Sitcov* referred to Section 11-2501 and to its "inherent authority" to regulate the practice of law in this jurisdiction. *Sitcov*, 885 A.2d at 297, citing *Brookens*, 538 A.2d at 1125. In that decision, as in the *Kennedy* decision, the Court of Appeals made no mention of the Home Rule Act.

condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer." D.C. Bar Rules, Appendix A. Rules of Professional Conduct 7.1 (b)(2), (3) (2008). In addition, the Rule precludes use of an intermediary to solicit clients in certain circumstances, including assisting promotional activities of any organization that involves "the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct." Rule 7.1 (b)(5) (2008).

It is clear that the problematic conduct by lawyers addressed by the Rule was a primary focus of the Council in its consideration and eventual passage of the Act. But as noted above, the Court does not find that the authority of the Court of Appeals to regulate the practice of law in the District of Columbia, either based on the Court's inherent authority or based the applicable statutes, is "exclusive," in the sense that it would preclude the Council from enacting legislation pursuant to its police powers that might also affect the conduct of lawyers in some respect. Even if there is an overlap between the authority of the Court of Appeals to regulate the practice of law by members of the District of Columbia Bar and the authority of the Council to enact legislation to protect against invasions of privacy and harassment of accident victims and consumers in the District of Columbia, those overlapping powers only constitute a violation of separation of powers if the intruding branch "impermissibly undermines the powers" of the other branch or "disrupts the proper balance between the coordinate branches by preventing the [allegedly intruded on] branch from accomplishing its constitutionally assigned functions." *Hessey v. Burden*, 584 A.2d 1, 5 (D.C. 1990) (internal citations omitted); *see also Morrison v. Olson*, 487 U.S. 654, 693-94 (1988).

This Court does not find that the Council's passage of the Act, in the exercise of its power to enact criminal laws of general applicability, impermissibly burdens or unduly interferes with the authority of the Court of Appeals to exercise its core functions relating to Bar admission and discipline of attorneys, under the Home Rule Act, D.C. Code § 11-2501 and the Court of Appeals' inherent authority to regulate the practice of law in the District of Columbia. *See Hessey*, 584 A.2d at 6. The Act does preclude practitioners, including but not limited to attorneys, from in-person solicitation of accident victims for 21 days, and the Rules of Professional Conduct do not include such an absolute time-bound restriction. But the Council's enactment of that restriction, in a narrowly drawn antifraud criminal and consumer protection statute intended to protect against harassment of motor vehicle accident victims and the invasion of their privacy, in the immediate aftermath of an accident, does not unduly burden the Court of Appeals in the exercise of its core functions. To the contrary, it does not appear that the Act limits the authority or ability of the Court of Appeals to carry out its functions with regard to Bar admission, attorney discipline or the regulation of the practice of law in the District of Columbia in any significant way.[18] The Act therefore does not violate the separation of powers doctrine.

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[18] The logical extension of the plaintiff's argument is that the Council could not legislate on any subject affecting the public welfare, if that conduct related to the practice of law by lawyers. Such an interpretation would preclude prosecution of a lawyer for failing to pay taxes on income derived from his or her law practice, or, as the Council defendants note, for theft of client funds. It also goes against the long-standing principle, discussed above, that restrictions on the Council's legislative authority are to be narrowly construed.

V.

Based on the foregoing, the Court finds that the plaintiff has not established that the Act violates the First Amendment or that it is in conflict with the Home Rule Act, or with the statutory authority of the Court of Appeals under Title 11 of the D.C. Code, or with the inherent authority of the Court of Appeals to regulate the practice of law in the District of Columbia. The plaintiff therefore is not entitled to injunctive relief, and the defendants are entitled to summary judgment.

It therefore is by the Court this 23rd day of May 2008

ORDERED that the plaintiff's Motions for Preliminary Injunction and for Permanent Injunctive Relief be and they hereby are DENIED, and it is

ORDERED that the District of Columbia's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment be and it hereby is GRANTED, and it is

FURTHER ORDERED that the Council Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment be and it hereby is GRANTED, and it is

FURTHER ORDERED that in light of the disposition herein, the Joint Motion for Status Hearing be and it hereby is DENIED AS MOOT, and it is

FURTHER ORDERED that judgment be and it hereby is entered in favor of defendants and against the plaintiff, and this case be and it hereby is dismissed.

/s/ Judith Bartnoff
Judge Judith Bartnoff
Signed in Chambers

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

CA No. 06-7992

SCOTT N. BERGMAN, ESQ.

v.

DISTRICT OF COLUMBIA, *et al.*

AFFIDAVIT OF SCOTT N. BERGMAN IN SUPPORT OF MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND FOR DECLARATORY JUDGMENT

I, Scott N. Bergman, declare upon my oath under penalty of perjury as follows:

1. I am a licensed attorney in the District of Columbia, a member of the Washington DC Bar, American Bar Association, Federal Bar Association, the Association of Trial Lawyers of America and the National Association of Consumer Advocates. I am also a former term member of the DC Bar Litigation Section Steering Committee and the LPM Section Steering Committee.

2. I submit this affidavit to describe the immediate and irreparable harm being imposed on my law practice as a direct consequence of the enactment of DC Criminal Law 16-0144 by the Council of the District of Columbia (the "White Collar Insurance Fraud Amendment Act of 2006"). I am competent to

testify as to the matters set forth herein, and would so testify if called as a witness at trial.

3. My legal practice is exclusively dedicated to the representation of motor vehicle accident victims who seek fair compensation from insurance companies and self insured governments like the District of Columbia for the negligent or deliberate acts of their insured and/or their employees. Each year, I contact approximately 4,000 potential clients in accordance with D.C. Bar Rule 7.1, which allows solicitation within ethical guidelines. I form an attorney-client relationship with approximately 200 of these people each year. Many of my clients are among the District of Columbia's poorest residents. Many know no lawyers, and have no legal representation, prior to my contact with them. Many speak little English. Many of my clients are terrified of the court system. Many have no health insurance. Many confuse insurance adjusters who approach them after an accident with lawyers or government officials, and in my experience would sign almost anything put before them but for my legal advice.

4. I was able to make contact with the overwhelming number of my clients by viewing and copying D.C. motor vehicle accident reports, known as PD-10 forms, at the seven District station houses each day. I have helped over 1,000 accident victims in the Washington D.C. area vindicate their rights.

5. Since D.C. Law 16-0144 has taken effect, my employees and I have been systematically blocked by the D.C. Police from viewing any of the PD-10 auto accident police reports at any of the seven District stations. As a direct result, I have seen a dramatic reduction in my caseload. I have been denied the right and ability to contact all potential clients except

a small number who have been referred through my previous clients and friends. Based on the rapidly declining rate of my active caseload, I expect that I will be out of business by next year as a result of the enactment of D.C. Law 16-0144.

6. Meanwhile, insurance companies and their representatives have continued aggressively to make contact with the unrepresented victims of motor vehicle accidents. The insurance companies then persuade these victims to sign binding and often uncompensated releases and/or one sided settlement agreements without informing these victims of their rights to consult with an attorney, much less to be represented by one.

7. D.C. Law 16-0144 has caused serious harm to my legal practice and my effectiveness in representing auto accident victims in the District of Columbia. I have been unable to obtain any D.C. PD-10 police reports in order for my firm to make the allowable arms length contact by phone and/or mail to victims of auto accidents that occur within the District. Starting on September 14, 2006, I made several DC-FOIA requests to the D.C. Police Department, by mail, e-mail and by fax. My DC-FOIA requests have all been ignored in silence by the D.C. Police Department.

8. Several employees of my firm have been denied access to the reports by employees of the Washington D.C. Metropolitan Police Department at various District station houses since DC Law 16-0144 was enacted. The actions by the D.C. Police Department even scared one of my employees into quitting his employment with my law firm. When confronted, D.C. Police Department officers have stated to my employees and me that Police Chief Ramsey had

implemented procedures of D.C. Law 16-0144 under interdepartmental memo General Order 401.3 that went into effect on August 11, 2006. One of those procedures was to block all access of viewing and copying police reports by personal injury lawyers and their employees. The officers stated to us that we will never be able to view nor copy the auto accident reports again solely due to the fact that I am a personal injury lawyer. However, they confirmed to me what is plain from the law: that persons involved in the accidents and agents of insurance companies may regularly see the reports simply by showing that they were involved in the accident or that they work for an insurance company.

9. Prior to this law, insurance companies, with their adjusters and lawyers, already enjoyed a strategic advantage over unrepresented victims of motor vehicle accidents. Now, this law has given a far greater unfair advantage to insurance companies by letting them immediately solicit unrepresented victims who do not, and will not, know their rights nor the procedures for seeking justice in the courts. Now insurance companies and their trained adjusters can freely manipulate unrepresented victims to obtain releases of all claims in return for modest and sometimes unconscionably low settlement payments. Simply put, the insurance companies can aggressively promote their interests by approaching victims immediately after the accident takes place while I cannot offer advice to these victims for a period of three weeks. Regardless, even after the three week period is over, I still can not get access to the PD-10 motor vehicle accident reports from the DC Police Department in order to be able to find out who the victims even are.

10. D.C. Law 16-0144 has now limited my ability to effectively represent legitimately injured citizens and has created a major case reduction in my motor vehicle accident clientele, while at the same time, the law allows the insurance representatives continued unlimited access to and information from all auto accident cases in the District of Columbia.

11. This new law has caused serious financial stress on my firm since its enactment several months ago and it will continue to do so. If I do not obtain the immediate relief sought with this Honorable Court then the new criminal DC law 16-0144 will put my DC legal practice out of business by next year. This will not only put me out of a lawful and honorable calling but will do a grave and dangerous disservice to the hundreds of new victims I could have helped vindicate their rights in the District but for DC Law 16-0144.

I swear under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct.

Dated: January 7, 2007

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Scott N. Bergman, Esq.

APPENDIX D

Testimony of Keith W. Watters
Bar Association of the District of Columbia

to the District of Columbia City Council
Committee on the Judiciary
Phil Mendelson, chair

July 12, 2005

Mr. Chairman and Committee members:

My Name is Keith W. Watters and today I have the honor of testifying in support of the White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2005, ["the Act8"] Bill 16-208.

I appear today in my capacity as President-Elect of the Bar Association of the District of Columbia ["the Bar Association"]. Founded in 1871, the Bar Association is one of the oldest associations of lawyers in the nation. We are comprised of a broad cross-section of lawyers, judges, professors and law related professionals.

Mr. Chairman, I am here today because the Act does not go far enough to rectify a serious problem in our community. During the past few years we have witnessed the growth of an aggressive cadre of "runners" who make their living by seeking out persons involved in mostly minor accidents and convincing them to make injury claims. Runners and the lawyers who employ them are an unsavory group and they have cast a dark shadow on the legal profession and the legitimate claims of injured parties.

After an accident, runners will utilize scanners and police contacts to immediately report to the location of the most serious accidents. Once there, they solicit accident victims at a most vulnerable moment. More

over, I have learned that Emergency Medical Personal have complained that the runners have interfered in the execution of their life saving duties. Upon arriving at the hospital, runners solicit victims and family in the waiting rooms. There have even been reports that hospital personnel have accepted gratuities to steer accident victims to runners.

Once police accident reports have been filed they become public records. Needless to day the runners literately line up to get access to these police reports so that the solicitors can go in to full swing. In fact, earlier this year the 6th District briefly stopped allowing runners access to the reports because a fist fight erupted in the station. Once the accident report has been viewed, the accident victim and their family can expect an unrelenting barrage of telephone call and in person solicitations starting at 5:00 am in the morning. One victim reported 17 calls in one day. Runners are outlawed in 49 states. We would strongly recommend that the District immediately ban this distasteful and corrupt practice.

As you may know, an accident report often contains the date of birth, social security number, home address and other highly personal information. In this era of identity theft, stalkers, and general privacy concerns, the public should be protected form this type of intrusion into this problem by restricting access to police reports to those parties who have legitimate interest in viewing them. We strongly support legislation which would address this problem. Pennsylvania and many states have laws which restrict access to police reports. Such a common sense restriction in the District is desperately needed.

Perhaps the most egregious aspect of the foregoing situation is the false public perception that many

accident victims make claims as a result of coaxing by runners. Citizens pursuing legitimate claims will face an increasingly suspicious insurance industry and jury pool. One insurance company noted a marked decline in the number of injury claims during the period when the 6th District stopped allowing runners access to accident reports. The clear implication is that persons who would otherwise not make a claim were talked into doing so by a runner. Unnecessary claims clearly lead to rate increases for the parties involved and the public at large.

The Bar Association strongly recommends passage of The Act, and the proposed amendment to ban runners and general access to police accident reports.